Supreme Court, U.S.
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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,
v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the nonstatutory labor exemption to the antitrust laws immunizes from antitrust scrutiny all concerted restraints on competition for the services of unionized employees that are unilaterally imposed by a multiemployer cartel after the employers and the union have reached impasse in collective bargaining, so that employees must forego the benefits of collective bargaining to challenge such restraints under the antitrust laws.

PARTIES TO THE PROCEEDING

Petitioners are a class of professional football players who played on developmental practice squads of the 28 teams of the National Football League during the 1989 season. The named petitioners are Antony Brown, James Bishop, John Buddenberg, Gary Couch, Craig Davis, Ricky Andrews, Thom Kaumeyer, Wesley Pritchett and John Simpson, who were named plaintiffs in Civil Action No. 90-1071, a class action brought in the United States District Court for the District of Columbia. Petitioners were appellees in the Court of Appeals.

Respondents, defendants-appellants below, are Pro-Football, Inc., d/b/a Washington Redskins; the Five Smiths, Inc., d/b/a Atlanta Falcons; Buffalo Bills, Inc., d/b/a Buffalo Bills; Chicago Bears Football Club, Inc., d/b/a Chicago Bears; Cincinnati Bengals, Inc., d/b/a Cincinnati Bengals; Cleveland Browns, Inc., d/b/a Cleveland Browns; Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys; PDB Sports, Ltd., d/b/a Denver Broncos; the Detroit Lions, Inc., d/b/a Detroit Lions; Green Bay Packers, Inc., d/b/a Green Bay Packers; Houston Oilers, Inc., d/b/a Houston Oilers; Indianapolis Colts, Inc., d/b/a Indianapolis Colts; Kansas City Chiefs Football Club, Inc., d/b/a Kansas City Chiefs; Los Angeles Raiders, Ltd., d/b/a Los Angeles Raiders; Los Angeles Rams Football Company, Inc., d/b/a Los Angeles Rams; Miami Dolphins, Ltd., d/b/a Miami Dolphins; Minnesota Vikings Football Club, Inc., d/b/a Minnesota Vikings; KMS Patriots, L.P., d/b/a New England Patriots; the New Orleans Louisiana Saints Limited Partnership, d/b/a New Orleans Saints; New York Football Giants, Inc., d/b/a New York Giants; New York Jets Football Club, Inc., d/b/a New York Jets; the Philadelphia Eagles Football Club, Inc., d/b/a Philadelphia Eagles; B & B Holdings, Inc., d/b/a Phoenix Cardinals; Pittsburgh Steelers Sports, Inc., d/b/a Pittsburgh Steelers; the Chargers Football Company, d/b/a San Diego Chargers; the San Francisco Forty-Niners, Ltd., d/b/a San Francisco Forty-Niners; the

Seattle Professional Football Club, d/b/a Seattle Seahawks; Tampa Bay Area NFL Football, Inc., d/b/a Tampa Bay Buccaneers, Inc.; and the National Football League.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Antony Brown, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 50 F.3d 1041 (D.C. Cir. 1995) and reprinted in the appendix ("App.") to this petition at pages 1a-60a. The Court of Appeals orders denying petitioners' petition for rehearing and suggestion for rehearing *in banc* are reprinted at App. 61a-63a. The D.C. Circuit's opinion reversed a memorandum opinion and order of the United States District Court for the District of Columbia granting petitioners' motion to strike respondents' nonstatutory labor exemption defense. The District Court's decision is reported at 782 F. Supp. 125 (D.D.C. 1991) and reprinted at App. 64a-92a. The District Court's subsequent decision granting petitioners' motion for summary judgment on liability, which is not directly at issue in this petition, is reported at 1992-1 Trade Cas. (CCH) ¶ 69,747 (D.D.C. 1992) and reprinted at App. 93a-115a.

JURISDICTION

The Court of Appeals issued its opinion on March 21, 1995. App. 1a. Petitioners filed a timely petition for rehearing, which the Court of Appeals denied on June 12, 1995. App. 61a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, provides in pertinent part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

STATEMENT OF THE CASE

This closely watched case goes to the heart of the fundamental interplay between the federal labor laws and the antitrust laws—an interplay critical to labor relations and competition for labor services in every American industry characterized by multi-employer bargaining, most particularly the professional sports and entertainment industries where unions are often organized to *preserve* competition among employers for the services of highly talented athletes and entertainers. The issues presented are also of great public importance to the federal government's ability to enforce and harmonize these two paramount statutory charters in commercial fields involving millions of employees.

A. Overview

In this class action suit, petitioners—a class of professional football players called "developmental squad" players—claim that respondents the National Football League ("NFL") and its 28 member clubs violated § 1 of the Sherman Act by agreeing among themselves to impose a league-wide uniform salary on petitioners. The fixed sal-

ary had never been part of any collective bargaining agreement with the players; the regime was unilaterally imposed without the consent of the players' union, the NFL Players Association, after the NFL and the Players Association had reached impasse over the issue.[1] Although the players have never consented to any fixed salary in the course of collective bargaining with the NFL, respondents nevertheless interposed the defense of the nonstatutory labor exemption to the antitrust laws.

The nonstatutory labor exemption is entirely a judicial construct that was developed by this Court in a series of decisions from 1945 to 1975.[2] The exemption is necessary to harmonize the Sherman Act's policy favoring free competition with the NLRA's policy favoring collective bargaining agreements. This Court has held that "a proper accommodation" between these two congressional policies "requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975).

In a sweeping opinion of far-reaching consequence, a divided panel of the Court of Appeals dramatically expanded the scope of the nonstatutory labor exemption to create, in the words of the United States (participating as amicus curiae in support of rehearing below), a wholly "new construct" contrary to the "well-established body of precedent" developed by this Court and other courts of appeals, including the Sixth and Eighth Circuits. App.

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[1] "Impasse" means "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (internal quotation marks omitted).

[2] *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975); *Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797 (1945).

120a, 121a n.3.[3] The Court of Appeals held that once a collective bargaining relationship exists between a group of employers and a union, the antitrust laws have no further application whatsoever to any concerted restraints on competition imposed by the employers that primarily affect the labor market—that the antitrust laws, in other words, are entirely *ousted* by the collective bargaining process. *See id.* 29a; *id.* at 41a, 45a (Wald, J., dissenting).

Five years ago, in *Powell v. NFL*, No. 89-1421 (Oct. Term 1990), *cert. denied*, 498 U.S. 1040 (1991), this Court invited the Solicitor General to express the views of the United States on a petition for certiorari to the Eighth Circuit that raised a closely related question—whether the NFL could claim the protection of the non-statutory labor exemption when, after bargaining to impasse with the Players Association, the NFL unilaterally imposed on the players an industry-wide employment restriction that *had* been included in the parties' prior, expired collective bargaining agreement. Noting that no conflict then existed in the circuits and that the issue in *Powell* was "one on which additional experience in the lower courts could shed light," the United States nevertheless recommended that the Court grant review at that time because, in the view of the United States, the Eighth Circuit had committed an error of "serious consequence" and the question was "of sufficient importance to the proper functioning of the labor and antitrust laws, and to the maintenance of industrial peace," to merit immediate review. Brief for United States as Amicus Curiae 17-19, *Powell v. NFL*, No. 89-1421 (Oct. Term 1990) (U.S. filed Dec. 1990).

The Court now has the benefit of five additional years of percolation in the lower courts, including the thorough analysis of the District Court and the majority and dissenting opinions of the Court of Appeals in this case. With the Court of Appeals' opinion below and the Second

[3] The Brief for the United States as Amicus Curiae in Support of Petition for Rehearing, in *Brown v. Pro Football, Inc.*, No. 93-7165 (D.C. Cir. filed May 5, 1995), is reprinted at App. 116a-126a.

Circuit's recent opinion in *National Basketball Ass'n ("NBA") v. Williams*, 45 F.3d 684 (2d Cir. 1995), *pet. for cert. pending*, No. 95-137 (U.S. filed July 24, 1995), a clear division among the circuits has now emerged with respect to the nature and scope of the nonstatutory labor exemption. At least four circuits, led by the Sixth and Eighth Circuits, stand on one side of the conflict—emphasizing labor-management agreement as the operative test for the nonstatutory exemption—with the Second and D.C. Circuits on the other side—holding immune from antitrust review any multi-employer labor restrictions imposed once collective bargaining has begun, regardless of union consent.

These vitally important questions that have produced instability and conflict in the lower courts are now fully sharpened for the Court's review, and this case provides the best possible vehicle for resolution of the conflict. As Judge Tatel stated below: "This case presents antitrust and labor issues of national significance. The issues have been fully engaged and developed by the majority and dissenting opinions. Supreme Court review is essential to the resolution of these issues. *See* Sup. Ct. R. 10.1(c)." App. 63a (Tatel, J., concurring in denial of rehearing *in banc*). *See ibid.* (Wald, J., dissenting from denial of rehearing *in banc*) (this case "merits final resolution by the Supreme Court").[4]

B. Statement of Facts

The 28 respondent NFL clubs are direct competitors for the services of top-level professional football players. Together, respondents exercise monopoly power over the market for the services of the top-level players, since the players have no comparable alternative buyers for their

[4] Petitioners in *Williams* have suggested that because of the similarity of issues between the two cases, the Court consider the present petition together with the *Williams* petition. *See* Pet. for Cert. 3 n.5, *Williams v. NBA*, No. 95-137 (U.S. filed July 24, 1995). Petitioners agree.

uniquely valuable athletic talents if the NFL clubs collude to depress the price they will pay for players' services.[5]

Largely to counteract respondents' power and incentive to restrict competition for players' services and depress salaries through collusion, the players organized the Players Association, the exclusive bargaining representative for all NFL players, including petitioners. As long as the players have been represented in collective bargaining by the Players Association, every player's compensation has been determined through individual negotiation between each player and his team, subject only to certain minimum salary levels set forth, when applicable, in a collective bargaining agreement. The Players Association has never consented to a fixed regular season salary for any category of NFL player at any time in the course of collective bargaining with respondents.

In early 1989, when no collective bargaining agreement was in effect,[6] respondents adopted an amendment to the NFL Constitution, known as Resolution G-2, which created a new category of player—the developmental squad player. Developmental squad players would act as practice players in scrimmages with the clubs' active roster players and would be allowed to suit up and play in NFL games as replacements for active players. Under Resolution G-2, respondents agreed among themselves to limit the number of developmental squad players to six per club and to establish a league-wide fixed salary for their services.

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[5] In economic terms, respondents have monopsony power in the market for the services of top-level professional football players. *See* Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 72 (1993); Richard A. Posner & Frank H. Easterbrook, *Antitrust* 150 (1981); App. 39a-41a (Wald, J., dissenting). Respondents admitted in their answer to petitioners' complaint that they exercise such monopsony power, a point also acknowledged by respondents' expert at trial.

[6] A 1982 collective bargaining agreement had expired in 1987. No successor agreement was reached until 1993, several years after the events at issue. *See infra* note 14.

In subsequent bargaining with the Players Association, respondents proposed to pay all developmental squad players a fixed salary of $1,000 per week during the 1989 NFL season. Respondents "frankly admitted they wanted a $1,000 fixed salary for developmental squad players to save money." App. 57a-58a (Wald, J., dissenting); *see id.* at 98a. In prior seasons, the salaries for such practice players had been set through individual negotiations. Those salaries had averaged, in the 1988 season, just under $4,000 per week.

Consistent with its unwavering policy of insisting on the right of all players to negotiate their compensation individually, the Players Association refused to agree to the proposed $1,000 fixed salary. Respondents declared an impasse in bargaining over the salaries of developmental players and unilaterally imposed the $1,000 per week fixed salary. Respondents' concerted imposition of the fixed salary was enforced by the NFL, which promised disciplinary action, including loss of future draft picks, against any club that paid any developmental squad player any compensation or benefits other than the flat $1,000 per week fixed salary. App. 7a; *id.* at 67a.

C. District Court Proceedings

1. The named petitioners filed this action on May 9, 1990, on behalf of themselves and a certified class of 235 developmental squad players employed during the 1989 NFL season. Petitioners claimed that respondents' concerted imposition of the $1,000 per week fixed salary was an unreasonable restraint of trade in violation of § 1 of the Sherman Act.[7] Respondents invoked the nonstatutory labor exemption as a defense, and the parties filed cross-motions for summary judgment on the applicability of the defense.

2. On June 4, 1991, the District Court (Lamberth, J.) granted petitioners' motion to strike the nonstatutory

[7] Shortly after petitioners filed suit, respondents discontinued the fixed-salary developmental squads.

labor exemption defense and denied respondents' cross-motion. App. 64a-92a. Disagreeing with *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), the District Court ruled, first, that the nonstatutory labor exemption had expired with the expiration of the parties' prior collective bargaining agreement in 1987. App. 72a-80a. The court reasoned that extending the exemption past the end of a bargaining agreement would not accommodate but would actually contravene federal labor policy. *Id.* at 75a-79a. In the alternative, the District Court concluded that the nonstatutory labor exemption could in no event extend beyond impasse. *Id.* at 80a-86a. A contrary rule, in the court's view, would create a perverse incentive for employers to "feign or force impasse," *id.* at 83a, and would allow them to achieve their pre-impasse proposals "without having to make any compromises or resort to the economic forces which are part of the collective bargaining process." *Id.* at 84a. Finally, the court also concluded that the concerted implementation of the fixed salary could not be shielded because the Players Association had never at any point in collective bargaining agreed to the fixed salary. *Id.* at 86a-90a (relying on, *inter alia*, *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977)).

3. In a subsequent opinion, the District Court granted summary judgment for petitioners on the issue of antitrust liability. App. 93a-115a. The court found that respondents' concerted implementation of the fixed salary failed rule-of-reason analysis under § 1 because it was "significantly anticompetitive in its effect," *id.* at 111a, and lacked any relevant procompetitive justification. *Id.* at 110a-114a.

4. The case proceeded to a jury trial on damages. Based on evidence that developmental squad players would have earned an average of $5,189 per week during the 1989 season if not for respondents' elimination of competitive salary negotiations, the jury found aggregated

damages for the class in the amount of $10,116,547.[8] The District Court trebled the award pursuant to § 4 of the Clayton Act and entered a judgment against respondents of $30,349,642. 1993 Trade Cas. (CCH) ¶ 70,260 (D.D.C. 1993).

D. The Court of Appeals' Decision

1. A divided panel of the Court of Appeals reversed on the basis of the labor exemption. App. 1a-60a. Writing for the majority, Chief Judge Edwards held that "the nonstatutory labor exemption shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 10a.

a. Although acknowledging that this Court has recognized only a narrow nonstatutory exemption for "some union-employer agreements" and only where strictly necessary to achieve "a proper accommodation between the congressional policy favoring collective bargaining . . . and the congressional policy favoring free competition in business markets," *Connell*, 421 U.S. at 622, *quoted at* App. 11a, the majority nevertheless disagreed with those courts of appeals, including the Eighth Circuit in *Mackey v. NFL*, *supra*, that have limited the exemption's reach to subjects of labor-management agreement. App. 10a-17a. Instead, the majority reasoned that the exemption must be broad enough in scope to shield the entire collective bargaining process, not just agreements resulting from that process, and should apply whenever the alleged restraint on competition operates primarily in the labor market, as opposed to the product market. *Id.* at 16a.

b. In the majority's view, the process of collective bargaining under the NLRA presumes that labor and management will have "roughly equal power" to resort to

[8] Indeed, the respondent clubs admitted that as a result of the fixed salary, they reduced their payroll costs in 1989 by more than $12 million.

economic pressure tactics with minimal government intervention. *Id.* at 19a; *see id.* at 17a-19a. Since an employer does not violate the NLRA by making unilateral changes in employment terms upon impasse as long as those terms were proposed to the union in pre-impasse bargaining, *id.* at 18a, the court concluded that to "preserve the delicate balance of countervailing power that characterizes the process," antitrust can have no application to such unilateral changes. *Id.* at 19a-20a. "Injecting the Sherman Act into the collective bargaining process," the majority believed, "would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the federal labor laws." *Id.* at 20a.

c. Although the majority recognized the general rule, well-established in this Court's decisions, that the Sherman Act applies to restraints on labor markets as well as product markets, *id.* at 24a (citing *Radovich v. NFL*, 352 U.S. 445, 449-52 (1957)), "the inception of a collective bargaining relationship," in the court's view, "irrevocably alters the governing legal regime," App. 24a, and from that point onward the Sherman Act "necessarily is replaced by the NLRA paradigm of organized negotiation." *Id.* at 25a. Ultimately, the court concluded, employees must "choose whether to invoke the protections of the NLRA or the Sherman Act." *Id.* at 30a. "If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions." *Ibid.*

2. In dissent, Judge Wald criticized the majority for adopting "[a] rule that ousts antitrust law only to encourage fewer collective bargaining agreements" and that is thus "contrary to the purposes of *both* the labor laws and the antitrust laws." App. 49a (emphasis in original).

a. Judge Wald explained, first, that under settled case law the antitrust laws apply to multi-employer restraints on labor markets. *Id.* at 35a-41a. *See id.* at 37a-38a (citing, *inter alia*, *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926) (holding industry-wide agreement setting uniform terms and conditions of employment for seamen

subject to antitrust scrutiny); 2 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶¶ 338b & 338c (1978)). Where employers enjoy monopsony power over the labor market, as the NFL clubs admittedly do, concerted wage restraints will eventually degrade the quality of the product and harm consumers. App. 40a-41a. Antitrust has an important role in addressing such anticompetitive labor restraints, and "[t]hat role should be ousted only as necessary to implement clear congressional directives." *Id.* at 41a.

b. Judge Wald saw no such clear directive in the nonstatutory labor exemption decisions from this Court, all of which emphasize the exemption's limited purpose of accommodating antitrust to the labor policy favoring labor-management *agreement* through collective bargaining. *Id.* at 41a-45a. And, she observed, there is a lack of clarity in the lower courts, with the courts of appeals divided on the issue. *Id.* at 44a-45a.

c. She strongly disagreed with the majority's assessment that application of the antitrust laws would somehow upset the balance of power between unions and employers. *Id.* at 45a-50a. To the contrary, Judge Wald reasoned, the majority's rule "decisively tips the balance by giving employers important *new* rights, together with new incentives to harden their bargaining positions," letting multi-employer groups "unilaterally impose labor market restraints that heretofore might have exposed them to antitrust liability." *Id.* at 46a (emphasis in original). For example, the anticompetitive scheme condemned by this Court in *Anderson v. Shipowners' Ass'n, supra,* would now "be exempt from antitrust scrutiny" provided only the scheme were proposed in collective bargaining and implemented after impasse. App. 49a-50a. On the employees' side, the panel's opinion will discourage collective bargaining completely and lead to union decertification, the very opposite of the NLRA's goal of encouraging "'constructive, open discussions leading, it was hoped, to mutual agreement.'" *Id.* at 48a-49a (quoting *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970)).

d. Finally, Judge Wald reasoned that the majority had seriously confused bargaining "tactics" by employers (such as lockouts and striker replacement) with the unilateral imposition of "terms" of employment. App. 50a-58a. The employers' right unilaterally to impose terms after impasse is best understood *not* as a bargaining tactic protected against interference by the NLRA but as part of the employers' *residual right* to operate their businesses once the statutory duty to bargain has been exhausted. *Id.* at 51a. Employment terms unilaterally imposed at impasse merely serve the employers' own business interests and are "a substitute for an agreement, not a means of reaching one." *Id.* at 54a. After impasse, just as before the inception of collective bargaining, the exercise of the employers' "residual right" is subject to the "backdrop" of preexisting rights and obligations, including the federal antitrust laws. *Id.* at 54a-57a. The dissent explained how this Court's cases applying the doctrine of implied preemption under the NLRA demonstrate the point. *Id.* at 54a-57a (discussing, *inter alia, Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987)). Judge Wald concluded that the preemption "principles" of these cases apply as well to the nonstatutory labor exemption. App. 57a.

3. Petitioners sought rehearing of the panel's decision, and the United States (represented by the Assistant Attorney General for the Antitrust Division) took the highly unusual step of filing a brief as amicus curiae in support of rehearing. *Id.* at 116a-126a. In its brief, the United States argued that "[t]he sweeping antitrust immunity adopted by the majority has no support in Supreme Court precedent" and "weakens both antitrust and labor policy." *Id.* at 119a. The United States pointed out that the test applied by the Eighth and Sixth Circuits, focusing on labor-management agreement, represents "established law" and that the panel's decision here "creates a new, far broader implied antitrust immunity" that cannot be squared with the decisions of the other circuits. *Id.* at

121a. In the view of the United States, the panel's decision also conflicted with this Court's precedents forbidding expansion of implied antitrust exemptions except when there is a clear repugnancy between the antitrust laws and the regulatory system and even then only to the minimum extent necessary. *Id.* at 122a.

As noted earlier, Judge Tatel, in addition to Judge Wald, filed a statement expressing his view that "Supreme Court review is essential to the resolution of these issues." *Id.* at 63a.

REASONS FOR GRANTING THE WRIT

This case satisfies virtually all traditional criteria for the exercise of the Court's certiorari jurisdiction. *See* Sup. Ct. R. 10.1. There is a conflict among the courts of appeals over a purely legal question involving the relationship between two premier federal statutes. The reasoning in the Court of Appeals' opinion also conflicts with prior decisions of this Court in at least two significant respects. Moreover, the issues presented are of manifest importance, both to the antitrust laws and to the labor laws, a fact underscored by the unusually active interest the United States has taken in this case. If left unreviewed, the Court of Appeals' decision promises to undermine both statutory regimes and inevitably spawn greater instability in the lower courts.

Five years ago, in *Powell v. NFL*, the United States urged the Court to review issues similar to those presented here, even before the circuits were in conflict. This time around, with owner-player relations thrown into a state of legal uncertainty throughout professional sports and the lower courts divided, the issues are plainly ripe for Supreme Court resolution. This case presents the proper opportunity.

I. THE COURTS OF APPEALS ARE SHARPLY DIVIDED OVER THE NATURE AND SCOPE OF THE NONSTATUTORY LABOR EXEMPTION TO THE ANTITRUST LAWS, AND THE IMPORTANT ISSUES PRESENTED ARE RIPE FOR RESOLUTION BY THIS COURT.

There is a clear split among the courts of appeals over the operative test for applying the nonstatutory labor exemption. The Fifth, Sixth, Eighth and Ninth Circuits apply a test—derived directly from this Court's precedents—that turns on whether, at some point in bona fide bargaining between the union and the employers, the union has agreed to the challenged term or condition. The blanket exemption now crafted by the D.C. Circuit here and the Second Circuit in *NBA v. Williams* is wholly and explicitly detached from the notion of labor-management agreement. This bold rule represents a radical departure from the established test applied by the other circuits, as the United States argued in support of rehearing.

A. The derivation of the nonstatutory labor exemption by this Court and its established application in the lower courts demonstrate the importance of the pivotal element of labor-management agreement.

The nonstatutory labor exemption represents a narrow judicial extension of the statutory exemption for union activities contained in §§ 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and several provisions of the Norris-LaGuardia Act, 29 U.S.C. § 104 *et seq.* *See Connell*, 421 U.S. at 621-22. The exemption is based on the "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions" and is necessary because the statutory protections enacted by Congress apply only to unilateral actions by unions and not to "agreements between unions and nonlabor parties," including even collective bargaining agreements. *Id.* at 622. *See also United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

In creating the nonstatutory labor exemption, this Court has been careful to explain that its narrow purpose is to "accommodat[e]" the NLRA policy favoring collective bargaining and the competing requirements of the antitrust laws where such accommodation is "require[d]." *Connell*, 421 U.S. at 622. Consistent with the limited purpose of "harmonizing," *Pennington*, 381 U.S. at 665, the labor and antitrust laws, the Court has held only that "some *union-employer agreements*" must be accorded "limited" protection from antitrust sanctions. *Connell*, 421 U.S. at 622 (emphasis added). *See Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) (opinion of White, J.) ("Employers and unions are required to bargain about wages, hours, and working conditions, and this fact weighs heavily in favor of antitrust exemption for *agreements* on these subjects.") (emphasis added); *id.* at 711-12 (opinion of Goldberg, J.) ("To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they *reach an agreement* is to stultify the congressional scheme.") (emphasis added).

The emphasis on union-employer *agreement* follows from the doctrine's roots in the statutory labor exemption, which applies only "[s]o long as a union acts in its self-interest." *Hutcheson*, 312 U.S. at 232. Similarly, the nonstatutory labor exemption protects only "the unions' *successful* attempt to obtain [a] provision through bona fide, arm's-length bargaining *in pursuit of their own labor union policies*, and not at the behest of or in combination with nonlabor groups." *Jewel Tea*, 381 U.S. at 689-90 (opinion of White, J.) (emphasis added).[9]

Consistent with the limited exemption for certain categories of union-employer agreements described in *Connell*, *Jewel Tea* and *Pennington*, most courts of appeals have

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[9] *See Pennington*, 381 U.S. at 664 (because the NLRA "contemplates . . . agreements between the union and employers in a multi-employer bargaining unit," the nonstatutory exemption ensures "that a union may conclude a wage agreement" without violating the antitrust laws).

recognized that the nonstatutory labor exemption shields anticompetitive employer conduct only derivatively and only for agreements that have been successfully negotiated at arm's length with the employees' collective bargaining representatives.

The three-part test articulated in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), has come to be the operative test applied by the majority of courts that have addressed the issue. Under *Mackey*, a challenged restraint of trade will be immunized from antitrust scrutiny only where "the *agreement* sought to be exempted" (1) primarily affects only the parties to the collective bargaining relationship, (2) concerns a mandatory subject of collective bargaining, and (3) *"is the product of bona fide arm's-length bargaining." Id.* at 614 (emphasis added). Applying this test, the Eighth Circuit in *Mackey* held that the "Rozelle Rule"—a restraint on player mobility adopted by the NFL—was not entitled to immunity. The Rozelle Rule met the first two prongs of the court's test, but it failed the third because it had been "unilaterally promulgated by the clubs," and the Players Association had never engaged the NFL in bona fide arm's length bargaining over the rule, even though the rule *had* been incorporated by reference into the parties' collective bargaining agreement. *Id.* at 615-16.

The *Mackey* test, protecting only "agreement[s]" between employees and employers that are truly "the product of bona fide arm's-length bargaining," has been adopted and applied by the Sixth Circuit. *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 463 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-98, 1203 (6th Cir. 1979). It has also been endorsed and relied upon by the Ninth Circuit, *see Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1393-94 (9th Cir. 1987) (following "well-reasoned" *Mackey* test and exempting agreements that

"were the product of bona fide arms' length bargaining"), and the Fifth Circuit, *see Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 530-31 (5th Cir. 1982) (nonstatutory labor exemption protects acts of employer "only incidentally" where there is an "agreement" between the employer and the union; "[t]he antitrust claims do not allege that any of these defendants have entered into agreements with any unions; thus, the nonstatuotry exemption should not come into play under these facts") (citing *Mackey*), *cert. denied*, 464 U.S. 932 (1983).

The Eighth Circuit's later opinion in *Powell v. NFL* falls squarely within the *Mackey* line of cases. Contrary to the majority's suggestion below, *see* App. 14a n.4, *Powell* neither second-guessed the *Mackey* rule nor threatened the vitality of *Mackey*'s "agreement" requirement. Indeed, the *Powell* court expressly reaffirmed the three-prong *Mackey* test: "[W]e feel that the analytic framework which [*Mackey*] adopts with respect to the nonstatutory labor exemption must be employed in this case." 930 F.2d at 1298. Moreover, the parties in *Powell* did not dispute that each of the three prongs of the test was satisfied with respect to the terms of their prior collective bargaining agreements while those agreements were in effect. *Id.* at 1298-99. The only issue in *Powell* was whether a challenged restraint that *had* been expressly agreed to by the Players Association and included in the expired collective bargaining agreements was still protected by the exemption following expiration of the agreements and after the NFL and the Players Association had bargained to impasse over a new contract. That issue was expressly reserved in *Mackey*. *See* 930 F.2d at 1298; *Mackey*, 543 F.2d at 616 n.18 ("we need not decide whether the effect of an agreement extends beyond its formal expiration date for purposes of the labor exemption").

Whether one believes *Powell* was correctly decided,[10] the Eighth Circuit's decision to extend the antitrust exemption beyond impasse for an expired collective bargaining agreement that concededly was "the product of bona fide, arm's-length bargaining," 930 F.2d at 1299, was still very much a decision premised on the necessary existence of a "union-employer agreement[]," *Connell*, 421 U.S. at 622. The *Powell* court was explicit in its belief that the union's prior consent to the challenged restraint "clothed" the restraint "with union approval" even after impasse. *See* 930 F.2d at 1302 (reasoning that exemption should continue to apply "where 'the union has had a sufficient impact in shaping the content of the employer's offers' *and where the challenged restraint is 'clothed with union approval'* ") (emphasis added) (quoting J. Weistart & C. Lowell, *The Law of Sports* § 5.06, at 590 (1979)). Thus, the United States, in its amicus brief in support of rehearing below, correctly observed that *Powell* is part of the "well-established body of precedent" from which the Court of Appeals in this case consciously departed. App. 121a n.3.

B. The D.C. Circuit's opinion here and the Second Circuit's opinion in *Williams* have created a clear split with the *Mackey* circuits. The majority below explicitly repudiated any notion that the nonstatutory labor exemption turns on union consent. *See* App. 19a (rejecting argument that "union *agreement* ought to be a precondition to any invocation of the nonstatutory labor exemption") (emphasis in original); *id.* at 14a n.4 (refusing to follow *Mackey*). *See also id.* at 121a (Brief for United States in Support of Rehearing) ("The majority's decision, unlike the established body of law, does not base the nonstatutory labor exemption on workers' collective-bargaining agreements."). Instead, with no moorings in employee consent, the Court of Appeals' conflict-creating

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[10] Petitioners believe *Powell* was wrong, for much the same reasons advanced by the United States in its 1990 amicus brief in that case urging the Court to grant certiorari.

test cloaks with antitrust immunity all concerted actions undertaken by a multi-employer cartel aimed at the labor market, regardless of any anticompetitive purpose or effects, provided only that there exists a collective bargaining "relationship." *See id.* at 10a, 29a. The Second Circuit adopted virtually the same rule in *Williams*. *See* 45 F.3d at 688-93 (concluding that by enacting labor laws sanctioning multi-employer bargaining, Congress intended that the antitrust laws would not apply to any joint activity by a multi-employer association that is related to the collective bargaining relationship).[11]

There can be no better indicator of the conflict among the circuits than the present case. At no point in the collective bargaining process did the Players Association ever agree to respondents' proposal to pay fixed salaries for developmental squad players. Upon impasse, the clubs' general labor law duty to bargain with the Players Association no longer precluded the unilateral imposition of new employment terms that were never previously agreed to by the union. Such unilateral imposition was not, and could not have been, an "agreement" that was "the product of bona fide arm's-length bargaining." *Mackey*, 543 F.2d at 614. It is plain that this case would have been decided differently under the *Mackey* rule.

The true nature of the conflict is well illustrated by *Mackey* itself. There is no doubt that under the *Brown/Williams* rule, the court in *Mackey* would have reached

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[11] In theory, *Williams* could have been decided on the same narrow grounds as *Powell*, since the issue before both courts was the same—whether antitrust immunity continues to apply to restraints contained in a bona fide bargaining agreement after the agreement has expired and the parties have bargained to impasse. The thrust of the Second Circuit's decision, however, is unmistakably broader. *See* App. 58a n.9 (Wald, J., dissenting) ("the *Williams* court announced a broad ouster of antitrust law, similar to the majority's here"). Indeed, the D.C. Circuit here relied extensively on *Williams*'s reasoning in concluding that "antitrust policy must give way" in a collective bargaining relationship. App. 28a; *see id.* at 25a-29a.

the opposite outcome. The restraint at issue there primarily affected the labor market and was proposed by the NFL as part of the collective bargaining process. Those facts alone would easily qualify the Rozelle Rule for immunity according to the D.C. and Second Circuits, and whether the restraint was "the product of bona fide arm's-length bargaining" would be irrelevant.

C. In its amicus brief supporting certiorari in *Powell*, the United States informed the Court that at that time there was no conflict among the courts of appeals on the issue presented. Nevertheless, because of the perverse incentives created by the Eighth Circuit's decision to extend the nonstatutory labor exemption beyond impasse, and the harm that the *Powell* decision would inevitably wreak on the policies and goals of both the labor and the antitrust laws, the United States urged the Court to take the case without waiting for a conflict to develop in the lower courts. *See* Brief for United States as Amicus Curiae in *Powell* 13-19.

As the United States recognized in its brief supporting rehearing in this case, the conflict that was absent in 1990 has now emerged. What is more, the rule adopted below and in *Williams* is considerably broader and more sweeping in its "potential for mischief," Brief for United States as Amicus Curiae in *Powell* 18, than even *Powell*'s application of the *Mackey* test. The case for certiorari is now compelling. In the words of Judge Tatel, resolution by this Court is "essential." App. 63a (Tatel, J., concurring in denial of rehearing *in banc*).

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT THAT REQUIRE A CARÈFUL HARMONIZATION BETWEEN THE ANTITRUST LAWS AND OTHER APPLICABLE LAWS AND WITH THIS COURT'S LABOR PREEMPTION DECISIONS.

In addition to finding "no support" in this Court's precedents concerning the nonstatutory labor exemption, App. 119a (Brief for United States in Support of Rehearing), the Court of Appeals' opinion conflicts irrecon-

cilably with two other important lines of authority from this Court. These separate conflicts constitute independent grounds for the exercise of certiorari jurisdiction under Sup. Ct. R. 10.1(c).

A. First, the majority's decision conflicts with those cases disfavoring implied repeals of the antitrust laws and requiring courts to reconcile the antitrust laws with competing statutory regimes by giving effect to both as far as possible. *See, e.g., National Gerimedical Hosp. v. Blue Cross*, 452 U.S. 378, 388-89 (1981) ("Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.") (internal quotation marks omitted); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) ("proper approach . . . is an analysis which reconciles the operation of both statutory schemes . . . rather than holding one completely ousted"); *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939) (repeal by implication disfavored and allowed only to the extent of a "positive repugnancy" between the two laws).

These principles control the scope and application of the nonstatutory labor exemption. *See Connell*, 421 U.S. at 622 (explaining that the nonstatutory exemption is designed to achieve "a proper accommodation" of labor and antitrust policies and applies only to the extent "labor policy requires"); *Pennington*, 381 U.S. at 665 (nonstatutory exemption concerned with "harmonizing" the Sherman Act with the NLRA policy of peaceful negotiation); *id.* at 666 (analysis asks whether national labor policy "conflicts with" application of the antitrust laws).

The Court of Appeals, however, "completely ousted" antitrust, *Silver*, 373 U.S. at 357, without any meaningful effort to reconcile what it perceived as competing policies. In truth, there is no "positive repugnancy" between the NLRA's regime of collective bargaining and the Sherman Act's safeguards of competition that could justify the broad new exemption announced by the majority. As the United States advised the Court in *Powell*:

> "Neither the text nor the history of the NLRA fairly suggests that Congress implicitly intended broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. The text of the NLRA does not mention the antitrust laws, and the legislative history demonstrates no intent to restrict the preexisting rights of workers as the price of participation in a collective bargaining relationship—rights that presumably would continue to exist for other, non-unionized workers. To the contrary, the predominant thrust of the statute . . . is to expand the protection afforded employees." Brief for United States as Amicus Curiae in *Powell* 13-14.

The indictment offered by the United States in *Powell* applies with even greater force to the rule adopted by the D.C. and Second Circuits. Far from protecting labor policy, the complete ouster of antitrust rights under the *Brown/Williams* rule is utterly at war with that policy because it gives employees who choose collective bargaining distinctly fewer legal rights than employees who opt not to unionize. The fundamental labor law principle that all employees have a free and equal right to choose whether or not to have union representation for purposes of collective bargaining cannot co-exist with a rule that penalizes those who choose one option over the other.[12]

Furthermore, the NLRA's policy favoring collective bargaining is not impaired when antitrust review is applied to the unilateral implementation of employment terms by a multi-employer cartel. The employers' right to implement terms of employment post-impasse is simply

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[12] The harm to labor policy produced by the *Brown/Williams* rule is particularly evident on the facts of the present case. By choosing to be part of the bargaining unit represented by the Players Association, petitioners have, under the Court of Appeals' reasoning, permanently forfeited their antitrust rights as a practical matter. The option suggested by the Court of Appeals—union decertification, App. 30a—is illusory for petitioners, since the Players Association represents the entire roster of professional football players and cannot be expected to decertify solely to serve the interests of a narrow category of practice players like petitioners.

a continuation of their preexisting common law right to operate their businesses in pursuit of their own commercial interests. The concerted exercise of that right is ordinarily subject to review under the antitrust laws. *See, e.g., Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926) (antitrust laws apply to industry-wide agreement setting uniform terms of employment). Once impasse is reached, fruitful negotiations have ceased and the employers may revert to their preexisting rights and unilaterally implement their proposals *without further bargaining*. There is thus no reason to carve out an exception from the ordinary application of antitrust in the context of impasse. Moreover, any possible interference with the labor scheme that might result from the potential threat of an antitrust action is minimized, if not eliminated altogether, by the ability of the various employers in the bargaining unit to act individually upon impasse, instead of as a cartel.

On the other hand, the majority's complete ouster of antitrust from the union-employer relationship thwarts the objectives of the Sherman Act, since it prevents employees (and even the Government) from taking action against anticompetitive restraints in the labor market. The greater the restraint of trade, the greater the interests of the Sherman Act and the more significant will be the harm caused by this new rule. The harm is particularly pronounced in the present case, because the district court below made a finding that respondents' salary-fixing efforts were in violation of § 1, and the jury found that petitioners had suffered financial injuries totalling more than $10 million. Those findings are not before the Court and must be presumed correct.

In sum, the Court of Appeals has made no attempt to "accommodat[e]" the policies of the antitrust laws, and the court's ouster of antitrust is in no way "require[d]" by a conflict with the NLRA. *Connell*, 421 U.S. at 622. Indeed, the extraordinarily expansive rule adopted by the Court of Appeals actually does considerable harm to the very labor policies that were invoked to justify it.

B. There is a second respect in which the Court of Appeals' opinion cannot be squared with decisions of this Court. As argued by Judge Wald in dissent, App. 54a-57a, the majority's reasoning conflicts utterly with the Court's analysis in cases involving implied preemption under the NLRA. *See, e.g., Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

In the preemption context, the Court has staked out a clear distinction between the self-help *tactics* that parties are free to resort to as part of the collective bargaining process and the *terms* of employment that are the subject of the bargaining. The NLRA does not supersede state and federal laws that place substantive qualifications on terms of employment, such as minimum wage requirements. Such substantive qualifications are simply part of the preexisting legal "backdrop" against which the bargaining process occurs. *Fort Halifax*, 482 U.S. at 21. *See Metropolitan Life*, 471 U.S. at 757. Moreover, the Court has held that employees are entitled to rely on this legal backdrop in lieu of bargaining, and in the event of an impasse in negotiations, the preexisting backdrop controls. *See Livadas*, 114 S. Ct. at 2081-82 (labor law bargaining policy is not "served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course"); *Fort Halifax*, 482 U.S. at 20-22 ("backdrop" of preexisting law determines rights of employees and employers alike upon occurrence of bargaining impasse).

Significantly, in *Metropolitan Life*, this Court rejected an argument relied upon by the majority below: that a "law that interferes with the *end result* of bargaining" must be seen as "*even worse* than a law that interferes with the bargaining process." 471 U.S. at 752 (emphasis added). As explained by this Court, the labor laws are concerned with fostering "an equitable process" for bargaining, "not with particular substantive terms of the

bargain that is struck." *Id.* at 753. That core principle conflicts fundamentally with the Court of Appeals' analysis.[13]

Antitrust, like other forms of substantive regulation, such as occupational safety rules, minimum wage laws, and health insurance and employee benefit requirements, is properly seen as part of just such a "backdrop." The Court's decision in *Radovich v. NFL*, 352 U.S. 445 (1957), leaves no doubt that NFL-imposed restraints on players are subject to the antitrust laws and that antitrust rules are part of the backdrop for collective bargaining between the NFL and its players. *See id.* at 449-52. Although the rights created for the players by the Sherman Act can be *waived* through a collective bargaining agreement, that fact does not undercut the relevance of the labor preemption principles. Such a waiver is a voluntary relinquishment of a legal right and requires the consent of the employees through their labor representative. *See Livadas*, 114 S. Ct. at 2082 ("union-represented employees have the full protection of [preexisting] minimum standard[s], *absent any agreement* [*by the union*] *for something different*") (emphasis added). In *Fort Halifax*, moreover, this Court specifically held that a preexisting legal right is *not* preempted by the NLRA just because it is waivable through collective bargaining, and that, indeed, such waivability makes a legal right even more compatible with the NLRA. *See* 482 U.S. at 22.

As the United States argued on rehearing below, application of the antitrust laws to employers' concerted and unilateral imposition of wages "simply means that negotiations should ordinarily start from a competitive wage level rather than a level set by an employer cartel." App. 124a. That view is demanded by the labor pre-

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[13] *See Pennington*, 381 U.S. at 665 ("[T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.").

emption principles applied by this Court—principles that the Court of Appeals completely disregarded.

III. REVIEW BY THIS COURT IS APPROPRIATE BECAUSE THE COURT OF APPEALS' DECISION WILL HAVE PROFOUND AND LONG-TERM CONSEQUENCES FOR LABOR RELATIONS THROUGHOUT PROFESSIONAL SPORTS, THE ENTERTAINMENT INDUSTRY AND ALL OTHER INDUSTRIES THAT RELY ON MULTI-EMPLOYER BARGAINING.

In ousting antitrust entirely from the collective bargaining process, the Court of Appeals' decision will subvert the prospects for peaceful labor-management bargaining in major sectors of the national economy. These important consequences provide additional grounds for review by this Court.

As explained by the dissent below, the Court of Appeals' opinion gives multi-employer cartels a powerful new incentive to "hang tough on their demands" in collective bargaining and actually puts pressure on employees to abandon collective bargaining and forego unionization altogether. App. 47a (Wald, J., dissenting). These perverse incentives promise to undermine labor relations, not only in professional sports, but in the entertainment industry, the communications industry, and all other industries where employees individually negotiate terms of employment with multiple employers within the framework of a collective bargaining agreement.

In recommending certiorari in *Powell*, the United States warned of the consequences of extending the nonstatutory labor exemption beyond impasse:

> "Under the rule adopted by the court of appeals, the party burdened by the anticompetitive restraint (in this case, the players, as represented by their union) would apparently be relegated to three unsatisfactory options: (1) accede to the other side's terms (which are unlikely to represent a legitimate compromise because the other side is unlikely to pay for an antitrust exemption it can continue to enjoy

> for free); (2) call a strike (albeit with diminished chance of success because one of the levers available to achieve the initial contract—the credible threat of antitrust damages—is removed by perpetuation of the nonstatutory labor exemption after impasse); or (3) terminate the collective bargaining relationship and start from scratch. It is questionable whether that result is even appropriately compatible with the policies of the labor laws." Brief for United States as Amicus Curiae in *Powell* 15-16.

Experience in the sports industry in the five tumultuous years since *Powell* leaves no doubt that an unwarranted extension of the nonstatutory labor exemption, like that announced by the Court of Appeals here and by the Second Circuit in *Williams*, will inevitably "destabilize labor-management relations." Brief for United States as Amicus Curiae in *Powell* 18. Largely as a result of *Powell* (and more recently the *Williams* opinion), the business of professional sports over the past five years has been dogged by prolonged strikes and lockouts and by union decertifications. In direct response to *Powell*, professional football players decertified the Players Association and went without a bargaining agreement for six full seasons. *See* App. 30a, 48a.[14] In the National Hockey League, the players were locked out and no games were played for nearly half of last season.[15] Most recently, in

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[14] *See also supra* note 6. The NFL experience demonstrates the fallacy of the Court of Appeals' view that the collective bargaining process is strengthened by the elimination of antitrust. On November 6, 1989, as a direct result of the *Powell* decision, the Players Association formally abandoned its role as collective bargaining representative. Only after court approval of a comprehensive antitrust litigation settlement between the players and the team owners, including the payment of nearly $200 million in damages, *White v. NFL*, 822 F. Supp. 1389 and 836 F. Supp. 1458 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995), were the players able to reestablish their union and their bargaining relationship with the NFL.

[15] The Court of Appeals' reliance on recent experience in the NHL as proof that a collective bargaining agreement can be

the wake of *Williams*, labor-management relations in professional basketball have fallen into chaos. The owners have locked out the players, and hundreds of players have signed petitions to decertify their union. These results are particularly ironic for basketball, where antitrust had long proven to be a constructive complement to collective bargaining.[16]

Major league baseball, of course, has long been saddled with the "aberration" of a nonstatutory antitrust exemption. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). Baseball players' lack of antitrust rights has hardly been conducive to labor peace. It has produced the longest continuous streak of work stoppages and labor strife in any sport. Since the basic agreement was reached in baseball in 1970, there have been eight rounds of contract negotiations, *and each and every one has resulted in a strike or*

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reached without litigation, *see* App. 31a-32a, was misplaced. The NHL experience actually shows how collective bargaining can succeed when employers face a credible threat of antitrust action. The NHL owners publicly acknowledged that they refrained from unilaterally implementing their salary cap proposal after reaching an impasse with the players specifically because of the risk of antitrust liability. *See* Gordon, "NHLPA Eyes Suit; Owners May Hear Antitrust Charge," Boston Herald, Dec. 25, 1994, at B24. Ultimately, a new agreement was reached that did not include the owners' proposed salary cap.

[16] Professional basketball players had vigorously exercised their antitrust rights for well over two decades prior to *Powell* and *Williams*, and the players and the NBA owners had routinely incorporated the terms of court-approved antitrust settlements into new labor agreements. *See, e.g., Robertson v. NBA*, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977). Until *Williams*, players and owners in the NBA concluded three successive collective bargaining agreements without a strike or lockout. Since *Williams*, they have been unable to reach an agreement, the players have moved to decertify their union, and the NBA owners have locked out the players—the first work stoppage in NBA history. *See* Helyar, "Pro Basketball Loses Its 'Feel Good' Image in Nasty Labor Dispute," Wall St. J., Aug. 7, 1995, at A1.

lockout.[17] The latest negotiations spanned two seasons and produced the longest work stoppage in the history of professional sports. By virtue of the blanket nonstatutory exemption from antitrust adopted in this case and in *Williams*, all other unionized professional sports, as well as all other industries with similar economic structures, are now effectively subject to the same, once "aberration[al]," judge-made immunity from competition that has clouded baseball.

For these very reasons, the Chairman of the National Labor Relations Board has observed that one "major result" of the Court of Appeals' decision here is that the critical "balance" between the federal labor and antitrust laws will be "eliminated altogether" and the fundamental objectives of labor policy will be thwarted:

> "[I]n football, basketball and presumably hockey, antitrust law and its treble damages remedy is relegated exclusively to the non-union sector, thereby creating an incentive for the players in the major professional sports to be non-union and for employers to foster unionized relationships regardless of their bona fide origin or status—a result which is hardly compatible with the promotion of freedom of association, collective bargaining and autonomous labor-management relationships—goals all enshrined in the National Labor Relations Act." William B. Gould IV, *Baseball and the "Sultan of Swat": "The Curse of the Bambino"*, Daily Lab. Rep. (BNA), Apr. 28, 1995, at E-1, E-2.

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[17] *See* Hearings on Major League Baseball's Antitrust Exemption Before the Subcomm. on Antitrust of the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (Feb. 15, 1995) (statement of Donald M. Fehr, Executive Director, Major League Baseball Players Association). On August 3, 1995, the Senate Judiciary Committee approved S. 627, a bill that would repeal baseball's antitrust exemption for labor matters. The bill's principal sponsor, Senator Hatch, stated that partial repeal of baseball's exemption was necessary because antitrust "immunity has distorted labor relations in major league baseball." Chass, "Baseball's Antitrust Exemption Suffers a Setback," N.Y. Times, Aug. 4, 1995, at B7, B9.

Similar harm is likely to follow in the entertainment field and other industries where collective bargaining and individual contract negotiations have traditionally occurred in combination. The United States in *Powell* stressed that in economic terms "[t]he potential for mischief is quite broad":

> "It includes the entertainment industry generally, which has an economic structure similar to professional sports. And it conceivably includes the more than 600 collective bargaining relationships involving multi-employer associations, which in turn cover more than three million employees." Brief for United States as Amicus Curiae in *Powell* 18-19 (citations and footnotes omitted).

The Court of Appeals' decision, if unreviewed by this Court, thus threatens to work substantial and widespread harm to labor relations and competition in many significant areas, which is an independent reason for the Court to exercise its certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 11, 1995

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 17, 1994 Decided March 21, 1995

Nos. 93-7165, *et al.*

ANTONY BROWN; JAMES BISHOP; JOHN BUDDENBERG;
GARY COUCH; CRAIG DAVIS; RICKY ANDREWS;
THOM KAUMEYER; WESLEY PRITCHETT;
AND JOHN SIMPSON,
INDIVIDUALLY AND ON BEHALF OF ALL CLASS MEMBERS,
Appellees

V.

PRO FOOTBALL, INC., D/B/A WASHINGTON REDSKINS;
THE FIVE SMITHS, INC., D/B/A ATLANTA FALCONS;
BUFFALO BILLS, INC., D/B/A BUFFALO BILLS;
CHICAGO BEARS FOOTBALL CLUB, INC.,
D/B/A CHICAGO BEARS;
CINCINNATI BENGALS, INC., D/B/A CINCINNATI BENGALS;
CLEVELAND BROWNS, INC., D/B/A CLEVELAND BROWNS;
DALLAS COWBOYS FOOTBALL CLUB, LTD.,
D/B/A DALLAS COWBOYS;
PDB SPORTS, LTD., D/B/A DENVER BRONCOS;
THE DETROIT LIONS, INC., D/B/A DETROIT LIONS;
GREEN BAY PACKERS, INC., D/B/A GREEN BAY PACKERS;
HOUSTON OILERS, INC., D/B/A HOUSTON OILERS;
INDIANAPOLIS COLTS, INC., D/B/A INDIANAPOLIS COLTS;
KANSAS CITY CHIEFS FOOTBALL CLUB, INC.,
D/B/A KANSAS CITY CHIEFS;
THE LOS ANGELES RAIDERS, LTD.,
D/B/A LOS ANGELES RAIDERS;
LOS ANGELES RAMS FOOTBALL COMPANY, INC.,
D/B/A LOS ANGELES RAMS;

MIAMI DOLPHINS, LTD., D/B/A MIAMI DOLPHINS;
MINNESOTA VIKINGS FOOTBALL CLUB, INC.,
D/B/A MINNESOTA VIKINGS;
KMS PATRIOTS, L.P., D/B/A NEW ENGLAND PATRIOTS;
THE NEW ORLEANS LOUISIANA SAINTS
LIMITED PARTNERSHIP, D/B/A NEW ORLEANS SAINTS;
NEW YORK FOOTBALL GIANTS, INC.,
D/B/A NEW YORK GIANTS;
NEW YORK JETS FOOTBALL CLUB, INC.,
D/B/A NEW YORK JETS;
THE PHILADELPHIA EAGLES FOOTBALL CLUB, INC.,
D/B/A PHILADELPHIA EAGLES;
B & B HOLDINGS, INC., D/B/A PHOENIX CARDINALS;
PITTSBURGH STEELERS SPORTS, INC.,
D/B/A PITTSBURGH STEELERS;
THE CHARGERS FOOTBALL COMPANY,
D/B/A SAN DIEGO CHARGERS;
THE SAN FRANCISCO FORTY-NINERS, LTD.,
D/B/A SAN FRANCISCO FORTY-NINERS;
THE SEATTLE PROFESSIONAL FOOTBALL CLUB,
D/B/A SEATTLE SEAHAWKS;
TAMPA BAY AREA NFL FOOTBALL, INC.,
D/B/A TAMPA BAY BUCCANEERS, INC.;
AND NATIONAL FOOTBALL LEAGUE,
Appellants

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and consolidated case No. 94-7071

On Appeal from the United States District Court
for the District of Columbia
(No. 90cv01071)

Before: EDWARDS, *Chief Judge*, WALD and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* EDWARDS.

Dissenting opinion filed by *Circuit Judge* WALD.

EDWARDS, *Chief Judge:* This case poses a conflict between the policies underlying federal labor law and antitrust law in the context of a labor dispute involving professional football. In the Sherman Act, 15 U.S.C. § 1 (Supp. II 1990), enacted in 1890, Congress proscribed certain practices and agreements inimical to free trade as a means "to promote the national interest in a competitive economy." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (internal quotations omitted). There was no unified federal labor policy at the time of the passage of the Sherman Act. However, over fifty years later, when Congress passed the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* (1988), "it set down a federal labor policy . . . plainly meant to do more than simply alter the prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body [the National Labor Relations Board ("NLRB")] rather than the federalized judicial system." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 288 (1971). A principal tenet of this federal labor policy is that settlement of collective bargaining disputes should be achieved by "subjecting labor-management controversies to the mediatory influence of negotiations," not litigation. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964). In this case, we must determine whether the nation's labor laws or antitrust policy control where, after bargaining in good faith to a point of impasse, an employer group takes unilateral action to impose a fixed salary for a category of employees as an otherwise lawful step in the collective bargaining process established by the NLRA.

In 1989, the 28 clubs of the National Football League ("NFL") were engaged in collective bargaining with the NFL Players Association ("NFLPA"), the players' collective bargaining representative. During the course of bargaining, the NFL proposed to pay a fixed salary of $1,000 per week to any player assigned to newly formed practice squads. Had the parties been able to reach a settlement on this issue, they could have concluded an agreement establishing $1,000 per week as the salary for practice squad players, and this agreement would have posed no legal problems under the federal labor or antitrust laws. Such was not to be the case, however, for the parties bargained to impasse over the issue, after which the clubs unilaterally imposed the fixed salary for the 1989 NFL season. In response to the clubs' action, nine players who had been assigned to practice squads filed this class action antitrust lawsuit against the clubs and the NFL in the District Court, alleging that the fixed salary constituted an unreasonable restraint of trade in violation of the Sherman Act. During four years of ensuing litigation, the District Court held that the defendants' agreement on a fixed salary violated the Sherman Act, and, after a trial to determine damages, entered a judgment against the clubs and the NFL in the amount of $30,349,642, and enjoined them from ever again setting a uniform salary for any class of players.

While the clubs and the NFL raise a number of challenges to the District Court's actions, we need not address most of them, for we hold that the District Court erred in rejecting the appellants' claim that the *nonstatutory labor exemption* shields them from liability in this case. This exemption, a judicially-created doctrine designed to reconcile federal labor and antitrust policies, has had an important place in federal jurisprudence for almost 30 years. Although there has been much debate over the years regarding the scope of the exemption, there is at least one principle that seems clear: restraints on competition law-

fully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining relationship. Thus, employees confronted with actions imposed lawfully through the collective bargaining process must respond not with a lawsuit brought under the Sherman Act, but rather with the weapons provided by the federal labor laws.

The NFL was free to take unilateral action after impasse (just as the NFLPA was free to strike), because the action was a legitimate economic weapon available to be used in an attempt to force a settlement. This is exactly what federal labor policy condones, as the Supreme Court has often recognized:

> [A] particular activity might be 'protected' by federal law not only [where it falls] within § 7 [of the NLRA], but also when it [is] an activity that Congress intended to be 'unrestricted by *any* governmental power to regulate' because it [is] among the permissible 'economic weapons in reserve . . . actual exercise [of which] on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.'

Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 141 (1976) (quoting *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488, 489 (1960)). And, as the Second Circuit has recently held:

> [T]he antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a [collective bargaining agreement], or from using economic force to obtain agreement to those proposals. What limits on such conduct that exist are found in the labor laws.

National Basketball Ass'n v. Williams, 45 F.3d 684, 693 (2d Cir. 1995). We agree.

Because the NFL in this case acted lawfully within the framework of the collective bargaining process when it unilaterally imposed a fixed salary for practice-squad players, and because this action affected only the market for professional football player services, the nonstatutory labor exemption precludes any finding of liability under the Sherman Act. Accordingly, we reverse the decision of the District Court.

I. Background

This case arises from a labor dispute over salaries for a limited number of professional football players whose jobs required them to practice with regular NFL players, and to replace regular players who became injured, but not otherwise to play in NFL football contests. In 1987, a collective bargaining agreement governing the terms and conditions of employment for all professional football players expired, and the NFL and NFLPA began negotiations for a new agreement. In early 1989, with the two sides making little progress toward such an agreement, the owners adopted an amendment to the NFL Constitution that altered the rules governing players on the clubs' injured-reserve lists and established new Developmental Squads of practice and replacement players. The amendment, known as Resolution G-2, allowed each club to maintain a Developmental Squad of as many as six rookie or "first-year" [1] practice and replacement players in addition to its usual 47-player roster. Resolution G-2 departed from the customary NFL practice of setting player salaries through individual negotiation. It anticipated a fixed salary for the Developmental Squad players, though it did not establish the amount of that salary.

The NFL and NFLPA engaged in fruitless negotiations over Resolution G-2. On April 7, NFL Management

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[1] A first-year player is a player who, in a previous year, attended an NFL training camp but played in fewer than three regular season games.

Committee ("NFLMC") Executive Director Jack Donlan solicited a meeting with NFLPA Executive Director Gene Upshaw to negotiate the terms and conditions of employment for Developmental Squad players. On May 17, 1989, a league management committee proposed that the salary for Developmental Squad players be set at $1,000 per week. On May 18, Donlan again sought a meeting with Upshaw. Subsequently, on May 30, 1989, Upshaw responded with a letter stating that the NFLPA agreed only "that players can be listed on a developmental squad of an NFL club if they have all of the benefits and protections which players on the Active List have," including "the right to negotiate their own salaries." Letter from Gene Upshaw to Jack Donlan (May 30, 1989), *reprinted in* Joint Appendix ("J.A.") 54. Donlan and Upshaw met on June 16, 1989, to discuss the Developmental Squad portion of Resolution G-2. In a letter to Donlan memorializing the discussions at that meeting, Upshaw rejected the fixed salary component of the Developmental Squad proposal, holding to the position that "all players, including developmental, should have the right to negotiate salary terms, and that no fixed wage for any group of players is acceptable to the NFLPA." Letter from Gene Upshaw to Jack Donlan (July 6, 1989), *reprinted in* J.A. 58. As a result, Donlan concluded that the issue was "clearly at impasse" for "implementation purposes." Letter from Jack Donlan to Hugh Culverhouse *et al.* (June 16, 1989), *reprinted in* J.A. 55.

The NFL then unilaterally implemented the Developmental Squad program by distributing uniform contracts for Developmental Squad players to all teams. Club officials were advised that paying any such player more or less than $1,000 per week would result in disciplinary action, including loss of future draft choices. *See* Memorandum from Pete Rozelle, NFL Commissioner, to NFL General Managers, Player Personnel Directors (Aug. 24, 1989) at 1, *reprinted in* J.A. 2538. Resolution G-2 al-

lowed the clubs to form their Developmental Squads from players remaining available after each club reduced its regular roster to 47 players on September 4. Under the resolution, the clubs could sign Developmental Squad players to contracts after 4 p.m. on September 5, 1989. During the 1989 season, 236 players signed Developmental Squad contracts.

On May 9, 1990, appellee Antony Brown and eight other Developmental Squad players[2] ("the Players") brought a class action lawsuit against all 28 NFL clubs and the NFL itself on behalf of 235 of the 1989 Developmental Squad players, alleging that the defendants engaged in price-fixing in violation of the Sherman Act by setting a $1,000 fixed salary for such players. On June 4, 1991, the District Court granted the Players' motion for partial summary judgment, and denied the NFL's cross-motion, on the issue of whether the Players' suit was precluded by the nonstatutory labor exemption to the antitrust laws. *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991). The District Court relied on three alternative rationales to support its judgment. First, it held that the exemption ended when the parties' collective bargaining agreement expired in 1987. *Id.* at 130-34. Second, the court held that, even if the exemption survived the expiration of the collective bargaining agreement, it ended when the parties reached impasse regarding the issue of Developmental Squad player salaries. *Id.* at 134-37. Finally, the District Court held that, in any event, the exemption was inapplicable because it protects only restraints on competition contained in collective bargaining agreements, and the fixed salary had not previously been encompassed in any agreement between the NFL and NFLPA. *Id.* at 137-39.

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[2] The other players representing the plaintiff class were James Bishop, John Buddenberg, Gary Couch, Craig Davis, Ricky Andrews, Thom Kaumeyer, Wesley Pritchett, and John Simpson.

On March 10, 1992, the District Court granted the Players' motion for summary judgment on the issue of antitrust liability. *Brown v. Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,747 (D.D.C. 1992), *reprinted in* J.A. 422. With liability established, the District Court on September 21, 1992, began a ten-day jury trial on the issues of antitrust injury and damages. The jury awarded damages to the players in the class that, when trebled in accordance with section 4 of the Clayton Act, 15 U.S.C. § 15 (1988), totaled $30,349,642. *Brown v. Pro Football, Inc.*, Civ. Action No. 90-1071 (D.D.C. Oct. 5, 1992) (judgment on the verdict), *reprinted in* J.A. 2714. In the wake of this verdict, the District Court denied the clubs' motion for judgment as a matter of law, or a new trial, and granted the Players' request for a permanent injunction barring the clubs from ever again setting a uniform regular season salary for any category of players. *Brown v. Pro Football, Inc.*, 1993-1 Trade Cas. ¶ 70,260 (D.D.C. 1993), *reprinted in* J.A. 2911. Finally, on March 1, 1994, the District Court awarded the Players' counsel $1,744,578.41 in attorney's fees. *Brown v. Pro Football, Inc.*, 846 F. Supp. 108 (D.D.C. 1994).[3]

II. Analysis

On appeal, the clubs and the NFL challenge each of the District Court's decisions. However, we address only the District Court's rejection of appellants' nonstatutory labor exemption defense, because we deem it dispositive. We review *de novo* the District Court's entry of summary judgment on this issue. *SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994).

Appellants contend that the nonstatutory labor exemption applies to all restraints on competition imposed through the collective bargaining process, even those imposed unilaterally by an employer. In their view, any

[3] Meanwhile, the NFLMC and the NFLPA finally agreed to a new seven-year collective bargaining agreement on January 6, 1993.

other rule would disrupt the balance of power between unions and employers that exists under federal labor law. The Players, meanwhile, argue that the exemption applies only where a union has consented to a restraint on competition. They contend that the exemption must be narrowly constructed to apply only where unions act in tandem with employers, as, for example, by entering into collective bargaining agreements.

After reviewing relevant Supreme Court precedent and the policies underlying both the NLRA and the Sherman Act, we conclude that the nonstatutory labor exemption shields from antitrust challenge alleged restraints on competition imposed through the collective bargaining process, so long as the challenged actions are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship. Because the fixed salary for Developmental Squad players is such an action, we hold that the exemption shields the clubs and the NFL from liability in this case.

A. Origin of the Exemption

An exemption to the antitrust laws for activities related to collective bargaining traces its origin to sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 (1988), 29 U.S.C. § 52 (1988), and to the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (1988). Clayton Act section 6 excludes human labor from the definition of a commodity and provides that the antitrust laws do not prohibit labor organizations. Section 20 of that Act along with the Norris-LaGuardia Act, limits the authority of federal courts to enjoin specified union activities. While none of these statutory provisions is phrased in terms of an exemption from the Sherman Act, the Supreme Court has interpreted them generally to waive antitrust liability for unilateral union conduct such as boycotts and picketing. *See H.A. Artists & Assoc., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714-15 (1981); *United States v. Hutcheson*, 312

U.S. 219, 232 (1941). This exemption, known as the statutory labor exemption, does not exempt bilateral activity, such as "concerted action or agreements between unions and nonlabor parties." *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975). However, the Supreme Court has recognized

> that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.

Id. Unlike the statutory exemption, this nonstatutory exemption is available to both unions and employers. *See Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974); *see also, e.g., Powell v. NFL*, 930 F.2d 1293, 1303 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Although the Supreme Court has recognized a nonstatutory labor exemption to the antitrust laws, the scope of the exemption never has been conclusively delimited. Instead, the Court's cases in this area mark out only the general boundaries of the doctrine. The Court's first major decision addressing a restraint on competition imposed through the collective bargaining process came in *Allen Bradley Co. v. Local No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 799-800 (1945), in which a local union of electrical workers in New York City reached an agreement with local manufacturers and contractors requiring the contractors to buy equipment only from manufacturers employing union members, and the manufacturers to sell only to contractors employing union members. This arrangement severely curtailed competition from firms outside the city, inflating prices for electrical equipment in the local market. *Id.* at 800. When excluded manufacturers challenged the agreement under the Sherman Act, the union claimed an exemption from

antitrust liability. The Supreme Court rejected this claim, concluding that "Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." *Id.* at 808.

The Court reached a similar conclusion two decades later in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), in which it addressed an antitrust challenge to a contract between a union and large coal mining companies by which the union agreed to impose a new, higher wage upon smaller coal companies as part of a concerted effort to drive the smaller firms from the industry. A majority of the Court rejected the union's claim to an exemption from the Sherman Act. *Id.* at 661. While Justice White's opinion for the Court acknowledged that "a union may conclude a wage agreement with [a] multi-employer bargaining unit without violating the antitrust laws and . . . may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers," it held that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* at 664-65.

Pennington's promise of a nonstatutory labor exemption to the Sherman Act was realized in a companion case, *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., Inc.*, 381 U.S. 676 (1965). There, the Court, in opinions by Justices White and Goldberg, applied the exemption to shield from antitrust liability a multi-union, multi-employer agreement to close food store meat departments at 6 p.m. so as to prevent butchers from being replaced by self-service markets or unskilled workers during night hours. Justice White, writing for three justices, balanced the interest of union workers against the impact on the product market, finding the restriction on working hours to be of "immediate and

direct" concern to union members and noting that the subject matter of the agreement—employees' working hours—was "well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain" under the NLRA. *Id.* at 691. Justice Goldberg, writing for three other justices, went further, concluding that all "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to antitrust laws." *Id.* at 710.

Finally, in its most recent opinion on the subject, the Court in *Connell Construction*, 421 U.S. at 616, held the nonstatutory exemption inapplicable where a plumbers union forced a general contractor to sign an agreement requiring the contractor to subcontract construction work only to firms maintaining collective bargaining agreements with the union. The Court found that this arrangement "indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods." *Id.* at 623. The Court stated:

> This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

Id. at 625.

In assessing the relevance of these cases to the issue before us, we note initially that the Court never has considered whether the exemption applies where, as here, an antitrust claim arises from a dispute over a negotiable condition of employment between parties to the collective

bargaining process. Nevertheless, the Players contend that the Supreme Court's precedents dictate a rule to govern this case. They seek to extract from the Court's opinions a rule that the exemption applies only where a union has manifested its consent to a restraint on trade by signing a collective bargaining agreement. They emphasize that both the *Connell Construction* and *Jewel Tea* opinions refer to the nonstatutory exemption as a shield from antitrust liability for union-employer "agreements."[4] *Jewel Tea Co.*, 381 U.S. at 689 (White, J.); *Connell Constr. Co.*, 421 U.S. at 622. Absent union consent, the Players contend, the exemption is inapplicable. We disagree. Indeed, we believe that the Players' view is based on a distorted reading of the case law.

The language in the opinions upon which the Players rely must be read in context. As the previous discussion indicates, each of the pertinent Supreme Court cases involved an antitrust challenge to a union-employer agreement. In such circumstances, the Court's reference to the nonstatutory labor exemption in terms of a potential

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[4] Appellees also rely heavily on the Eighth Circuit's discussion of the nonstatutory labor exemption in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), which, they contend, "repeatedly expressed the understanding that the Supreme Court decisions precondition the exemption on an agreement." Brief of Appellees at 29. However, they overlook the Eighth Circuit's subsequent statement in *Powell*, 930 F.2d at 1301, that "[a] collective bargaining agreement is not always essential to a finding that challenged employment terms fall within the labor exemption." We also note, as did the *Powell* court, *id.*, that other decisions of the courts of appeals have applied the nonstatutory exemption to actions not embodied in collective bargaining agreements. *See, e.g., Amalgamated Meat Cutters v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979) (holding that employer's agreement with supplier to replace striking workers was protected by nonstatutory labor exemption); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1006-07 (5th Cir. 1970) (holding that employer's refusal to deal with union was exempt from Sherman Act), *cert. dismissed*, 404 U.S. 801 (1971).

shield from antitrust liability for such agreements is hardly surprising.[5] Certainly, no Supreme Court case expressly limits the exemption in the manner suggested by the appellees. Thus, nothing in any of the Court's opinions, from *Allen Bradley* to *Connell Construction*, disposes of the issue before us.

While not dispositive, however, the Court's opinions do provide significant guidance for our reconciliation of the competing antitrust and labor policies in this case. First, in its most extensive discussion of the nonstatutory labor exemption, the Court characterized the doctrine as representing a "proper accommodation between the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in business markets." *Connell Constr. Co.*, 421 U.S. at 622 (emphasis added). Thus, the Court recognized that the juxtaposition of policies giving rise to the exemption focuses on collective bargaining as a *process*, not merely on the *product* of that process—the collective bargaining agreement.

We also observe that, in applying the nonstatutory labor exemption, the Court consistently has struggled to balance the interests of those involved in collective bargaining against the impact of their activities on the *product market*, paying litttle attention to any impact on the *labor market*. *See, e.g., Pennington*, 381 U.S. at 663 (stating that union and mining companies who agreed on price at which companies would sell their coal could be unshielded by exemption because "the restraint on the product market

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[5] In this regard, we note that even one commentator who favors imposing a union consent requirement for application of the nonstatutory labor exemption acknowledges that a "precedent-oriented" approach to this issue is "problematic . . . because in no Supreme Court case has union consent been contested." Note, *Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 881-82 (1991) [hereinafter *Releasing Superstars*].

is direct and immediate"); *Jewel Tea*, 381 U.S. at 690 n.5 (stating that "crucial determinant" for application of exemption to an agreement is the agreement's "relative impact on the product market and the interests of union members"); *see also Wood v. National Basketball Ass'n*, 809 F.2d 954, 963 (2d Cir. 1987) ("Each of the [Supreme Court's] decisions [applying the nonstatutory labor exemption] involved injuries to employers who asserted that they were being excluded from competition in the product market." (emphasis omitted)). Nothing in the Court's opinions supports appellees' attempt to import antitrust principles into a labor market organized around a collective bargaining relationship. "Quite the contrary, the issue has been whether even to go so far as to impose antitrust sanctions for the kind of product market activities involved in *Pennington*." Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 27 (1971). In short, we agree with those commentators who have observed that

> [f]rom *Allen-Bradley* to *Pennington*, the majority of the Court has insisted that one factor be present before the Sherman Act applies to arrangements arrived at through collective bargaining: one group of employers must conspire to use the union to hurt their competitors. The line the Court has consistently sought to draw, therefore, is the line between the product market and the labor market.

Id. at 26.

Thus, from the Court's opinions we derive two principles to guide our application of the nonstatutory labor exemption. First, the exemption must be broad enough in scope to shield the entire collective bargaining process established by federal law. Second, the case for applying the exemption is strongest where a restraint on competition operates primarily in the labor market and has no anticompetitive effect on the product market. We believe

these principles find support not only in the Supreme Court's precedents, but also in the policies underlying both the NLRA and the Sherman Act.

B. The NLRA

The NLRA makes clear that federal labor policy focuses on collective bargaining as a process, rather than collective bargaining agreements alone. In the NLRA, Congress established "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). This obligation "is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981). Thus, two factors define the collective bargaining process under federal law: the "necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms." *Insurance Agents' Int'l Union*, 361 U.S. at 489.

As the foregoing suggests, collective bargaining under the NLRA is a carefully defined *bilateral* process. Unions and employers alike enjoy protections under the collective bargaining process. Unions are not the sole beneficiaries of the NLRA. For example, unions may strike, *see NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962); *see also* 29 U.S.C. § 163, but employers may lock out their workers, *see American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310-11 (1965). Further, unions are protected against unilateral action by employers with respect to subjects of mandatory bargaining while negotiations over such subjects are ongoing, *see NLRB v. Katz*, 369 U.S. 736, 743 (1962), and continue to enjoy this protection until negotiations end in impasse, *see Southwestern Steel &*

Supply, Inc. v. NLRB, 806 F.2d 1111, 1113 D.C. Cir. 1986). At that point, however, "an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1165 (D.C. Cir. 1992) (Edwards, J., concurring in denial of petition for enforcement) (emphasis omitted) (quoting *American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968)). Employers may not fire workers engaged in economic strikes, and must rehire such workers at the conclusion of such a strike absent "legitimate and substantial business justifications" for doing otherwise. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)). Under an exception to this rule, however, employers may hire permanent replacements for strikers. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). Finally, while the NLRA requires both employers and unions to bargain collectively, it does not require either side to agree. *See* 29 U.S.C. § 158(d) (providing that duty to bargain "does not compel either party to agree to a proposal or require the making of a concession"). Rather, the statute generally leaves the outcome of negotiations to the parties, with government intervention largely proscribed. *See Insurance Agents' Int'l Union*, 361 U.S. at 488 ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (stating that NLRB's role under the Act is "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties").

Thus, a careful reading of the federal labor laws militates strongly against the Players' argument that the nonstatutory labor exemption shields restraints on competition

only when unions have consented to them by signing collective bargaining agreements, for that argument necessarily incorporates the premise that federal labor policy somehow favors unions in the collective bargaining process. As the terms of the NLRA amply demonstrate, federal policy favors neither party to the collective bargaining process, but instead stocks the arsenals of both unions and employers with economic weapons of roughly equal power and leaves each side to its own devices.

Some commentators have suggested that union *agreement* ought to be a precondition to any invocation of the nonstatutory labor exemption, because, in their view, the federal labor laws are primarily designed to foster *employee rights* to engage in collective bargaining. At one level, this argument is a nonsequitur, for the right to engage in collective bargaining does not encompass the right of agreement. At another level, the argument expresses more an aspiration than a reality. It is true that the NLRA strongly protects the right to join and form unions, but at least since Congress passed the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* (1988) ("LMRA"), federal labor law has expressed a "policy of voluntary unionism." *Pattern Makers' League v. NLRB*, 473 U.S. 95, 105 (1985). The LMRA expressly gave employees the right to refrain from collective bargaining activity, *see* 29 U.S.C. § 157, and, while it maintained the obligation of employees to pay union dues under union security agreements, it established that an employer would commit an unfair labor practice by discharging an employee "for failing to abide by union rules or policies with which he disagrees." *Pattern Makers' League*, 473 U.S. at 106; *see* 29 U.S.C. § 158(a)(3). Thus, under the NLRA, employees have an equal right to join or refrain from joining unions and engaging in collective bargaining.

Accordingly, to accommodate federal labor policy, we must preserve the delicate balance of countervailing power

that characterizes the process. Injecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the federal labor laws. With such a weapon at their disposal, union workers could do what the plaintiff class has done here: invoke the antitrust laws and their threat of treble damages to gain an advantage in bargaining over a salary provision about which union members do not care deeply enough to strike. In sum, a proper respect for the national labor policy expressed in the NLRA and the LMRA requires us to recognize the nonstatutory labor exemption as a potential shield for all lawful actions taken by either unions or employers pursuant to the collective bargaining process. Indeed, only the most crude accommodation of the federal labor and antitrust policies would shield union-employer agreements from Sherman Act liability, but leave exposed the lawful means employed in the process to reach those agreements.

In this regard, we find it telling that those judges and commentators who favor leaving certain aspects of the collective bargaining process unshielded by the exemption cannot agree on any point at which the exemption must expire in order to properly accommodate federal labor policy. *See, e.g., Powell v. NFL,* 678 F. Supp. 777, 788 (D. Minn. 1988) ("[P]roper accommodation of labor and antitrust interests requires that a labor exemption relating to a mandatory bargaining subject survive expiration of the collective bargaining agreement until the parties reach impasse *as to that issue.*"), *rev'd,* 930 F.2d at 1293; *Bridgeman v. National Basketball Ass'n,* 675 F. Supp. 960, 967 (D.N.J. 1987) (holding that nonstatutory labor exemption for restraint on competition contained in expired collective bargaining agreement survives impasse in negotiations over new agreement "only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collecitve bargaining agreement"); Kieran M. Corcoran, *When Does*

The Buzzer Sound?: The Nonstatutory Labor Exemption In Professional Sports, 94 COLUM. L. REV. 1045, 1072 (1994) (suggesting that "the exemption should extend until it becomes clearly unreasonable for both of the parties to believe the particular provision will continue to exist in that form in a succeeding agreement"); Ethan Lock, *The Scope Of The Labor Exemption In Professional Sports*, 1989 DUKE L.J. 339, 400 (1989) ("[T]he proper accommodation of federal antitrust and labor law requires that the labor exemption expire simultaneously with the collective bargaining agreement."). The one common thread in this dizzying array of options is that not one of the proposals makes the slightest sense under established labor law principles.[6]

We also find it telling that the more recent decisions construing the nonstatutory labor exemption establish a clear trend in favor of shielding the collective bargaining process in its entirety. Most notably, in *Powell v. NFL*, 930 F.2d at 1293, the Eighth Circuit applied the nonstatutory labor exemption to bar an antitrust attack on free agency restrictions contained in an expired collective bargaining agreement even after negotiations on a new agreement ended in impasse. The *Powell* court concluded, as we do here, that

> [t]he labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this "level playing field" as the basis for their often tempestuous relationship, and we believe that there is substantial jus-

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[6] We also note that each of these alternatives has its own set of problems. In particular, those that require a court to determine when it is reasonable to believe a restraint on competition will be incorporated into a future collective bargaining agreement pose severe problems of administrability. Further, they are likely to prompt the negotiating parties to distort their positions through posturing designed solely to influence this determination.

> tification for requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise.

Id. at 1303; *see also, e.g., Williams*, 45 F.3d at 688 (holding that antitrust laws do not prohibit employers from bargaining jointly with a union and implementing their joint proposals in the absence of a collective bargaining agreement); *Wood*, 809 F.2d at 959 ("[N]o one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the [NLRA].").

Finally, we observe that the Players have offered no coherent theoretical framework in support of their view that the exemption expires with the collective bargaining agreement. Under their view, a multi-employer bargaining unit could be held liable under the antitrust laws for adhering to the terms of an alleged restraint on competition embodied in an expired collective bargaining agreement prior to impasse, despite the fact that employers face an unfair labor practice charge if they alter the terms of agreement during that period.[7] *See Southwestern Steel & Supply, Inc.*, 806 F.2d at 1113. At the same time, however, the Players submit that such employers could not similarly be held liable for locking out employees to gain an advantage in negotiations. *See* Tr. of Oral Argu-

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[7] The employers' duty to maintain the status quo even after expiration of a collective bargaining agreement fosters the bargaining process by protecting the union's position as the representative of the employees on subjects of mandatory bargaining, and by maintaining a stable environment for negotiations. *See Katz*, 369 U.S. at 747; *Insurance Agents' Int'l Union*, 361 U.S. at 485. We cannot fathom how subjecting actions taken pursuant to this duty to the threat of antitrust liability could possibly further the goals of the NLRA. Employers faced with such a threat might well hesitate to agree with unions on important terms when they know the union may immediately challenge the terms under the antitrust laws once their agreement expires.

ment at 42. We find this reasoning incomprehensible. Both an employer's adherence to expired terms prior to impasse and its decision to lock out employees are unilateral but lawful aspects of the collective bargaining process established by the NLRA—as, for that matter, is an employer's unilateral implementation after impasse of a term encompassed within its pre-impasse proposals.

In an effort to find a theoretical framework to support the Players' position, the dissent relies heavily on a purported distinction between the unilateral implementation of employment terms after impasse and other bargaining "tactics" utilized by both employers and employees in the collective bargaining process. Not only is such a distinction completely without support in the case law, but, as even the dissent itself acknowledges, such a view is patently contrary to Supreme Court precedent. On this point, the Court in *American Ship Building Co.*, 380 U.S. at 316, made it clear that an employer's right to "institute unilaterally the working conditions which he desires" is among the lawful "tools of economic self-help" available to be utilized as a tactic in collective bargaining. It is beyond the authority of this court to find otherwise.

C. The Sherman Act

As the policy underlying the NLRA supports the principle that the nonstatutory labor exemption shields the entire collective bargaining process, so too the policy underlying the Sherman Act supports the principle that the case for applying the exemption is strongest where a restraint on competition operates primarily in the labor market. The Sherman Act states simply that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. While the statutory language speaks broadly of *every* restraint of trade, the Supreme Court has long since limited its application to only those

restraints deemed unreasonable. *See Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911) (stating that "the criteria to be resorted to in any given [Sherman Act] case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason"). In an effort to give content to this reasonableness standard, courts have conceived of the Sherman Act as a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (internal quotations omitted). Thus, the Sherman Act's primary focus is the product market, not the labor market. As one preeminent commentator has stated, "the antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor—its compensation or hours of service or the selection and tenure of employees." Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 255 (1955). Indeed, in considering the standing of labor unions to bring antitrust claims, the Supreme Court has stated that "a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, *especially in disputes with employers with whom it bargains.*" *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983) (emphasis added).

We recognize, of course, that, as a general matter, the antitrust laws may apply to restraints on competition in non-unionized labor markets. *See, e.g., Radovich v. NFL*, 352 U.S. 445, 449-52 (1957). However, we think the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime. Once employees organize a union, federal labor law necessarily limits the rights of individual employees to enter into negotiations with their employer. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *see also* 29 U.S.C. § 159(a) (providing that representatives selected to bargain for employees in a collective bargaining unit "shall be the exclusive repre-

sentatives of all the employees in such unit for the purposes of collective bargaining"). Indeed, employers are positively prohibited from seeking to bargain with individual employees, absent consent from the union. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944). Moreover, employers may lawfully reduce competition in the labor market by forming multi-employer bargaining units, allowing for standardization of wage rates and working conditions within an industry. *See generally NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-96 (1957). Thus, once collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation—a paradigm that itself contemplates collusive activity on the parts of both employees and employers. Stubborn adherence to antitrust principles in such a market can only result in "a wholesale subversion" of federal labor policy. *Wood*, 809 F.2d at 959.

When this case is put in proper perspective, it is very difficult to take seriously the Players' claim that the action of the NFL violated the Sherman Act. If the Players had been negotiating with a single football team (instead of the multi-employer group), there is no doubt whatsoever that that single employer lawfully could have taken unilateral action to impose a fixed salary for practice team players after bargaining in good faith to a point of impasse. Indeed, the players do not assert otherwise, for they recognize that this is standard fare in labor law. And nothing in the antitrust law is intended to proscribe such unilateral action by a single employer. So the heart of the Players' position appears to be that the presence of a multi-employer bargaining unit should make a difference under the antitrust law. This is a wholly untenable position, we think, for the reasons given in a compelling decision recently issued by the Second Circuit:

> The existence of employer organizations that bargained with unions of employees pre-dated the pas-

sage of the Sherman Act in 1890. . . . Indeed, at that time these organizations existed at the national as well as local level. . . . Nevertheless, we find during the 104 succeeding years not a single instance, prior to this very case, of a union or an individual employee asserting the stark claim that the routine practices of multiemployer bargaining violate the antitrust laws. It is true that recent antitrust challenges in the professional sports industry have at times involved facts very similar to those in the instant matter, *see Powell*, 930 F.2d at 1293; *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987), but the multiemployer bargaining issue appears to have been raised obliquely, if at all.

To the extent Congress has focused on the legality of multiemployer collective bargaining, it has always indicated its approval, or at least an assumption of legality. In 1920, Congress sought in the Clayton Act to prevent federal courts from interfering in labor disputes. Although Congress was largely concerned with the effect of such interference on unions, the statute was phrased in an evenhanded fashion to protect employer conduct in labor disputes as well as that of unions. Section 20 thus exempted from federal prohibition "persons . . . terminating any relation of employment . . . or withholding . . . moneys or things of value," language that would permit multiemployer lockouts. 29 U.S.C. § 52. In 1932, Congress passed the Norris-LaGuardia Act, which barred federal courts from issuing injunctions against firms seeking to join, or remain members of, employer organizations, 29 U.S.C. § 104(b), and used language similar to that of the Clayton Act quoted *supra*, 29 U.S.C. § 104(c). The definition of persons involved in a labor dispute also recognizes the existence of employer organizations. *See*

29 U.S.C. § 113(b). *See also California State Council of Carpenters v. Associated Gen. Contractors,* 107 L.R.R.M. 2724, 2725 (9th Cir. 1981) ("[E]ven if the antitrust laws had been interpreted so as to bring multiemployer bargaining units within the scope of the Sherman Act, the statutory exemption found in section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, when read together with section 20 of the Clayton Act, 29 U.S.C. § 52, clearly exempts '[b]ecoming or remaining a member . . . of any employer organization' from the antitrust laws. 29 U.S.C. § 104(b)." (footnote omitted)). In 1947, Congress refused to limit multiemployer bargaining because it concluded that such bargaining "was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." [*NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen"),* 353 U.S. 87, 95 (1957)] (discussing congressional debate over the Taft-Hartley amendments of 1947).

The lack of any antitrust challenge to, or congressional action restricting, multiemployer bargaining, for a century during which it prominently existed, grew, and flourished, strongly suggests some kind of general understanding about the legality of multiemployer bargaining that is fundamentally inconsistent with [the Players'] claim.

* * * *

We believe that the history recounted here strongly suggests that Congress never intended that the antitrust laws prohibit multiemployer bargaining with a common union. Congress seemed to assume, and then to act on that assumption in 1947, *see Buffalo Linen,* 353 U.S. at 95-96, that multiemployer bargaining was both efficient and a necessary counterweight to union power. Such a belief arguably fits within Rule of Reason analysis that permits "an-

> cillary restraints" necessary to a legitimate transaction. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899). Whether as a court we would reach that result if writing on a clean slate is not the issue, however, because whatever doubt might have existed as to Congress' intent was entirely eliminated by the passage of federal labor laws.
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> [M]ultiemployer bargaining has been a conspicuous feature of collective bargaining since the very formation of unions. To hold at this late date that it—or the essence of practice under it—is illegal under the antitrust laws would cause a massive reshaping of the institution of collective bargaining. . . . The only basis for the claim asserted by [the Players] is that multiemployer bargaining is illegal.
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> *Buffalo Linen* simply cannot be reconciled with [the Players'] antitrust claim. The facts in that case plainly involved conduct that, if antitrust principles apply, were price-fixing and a joint boycott, *per se* violations of the Sherman Act. However, the decision not only permitted the conduct but also stated that Congress had expressly considered multiemployer bargaining and had resolved to allow it subject only to the limitations of labor law as interpreted by the Labor Board.

Williams, 45 F.3d at 692.

We therefore conclude that when federal labor policy collides with federal antitrust policy in a labor market organized around a collective bargaining relationship, antitrust policy must give way. No one disputes that this conclusion is correct where a restraint on trade is embodied within a valid collective bargaining agreement. However, we see no need for a different rule in cases

in which a multi-employer bargaining unit lawfully implements a term rejected by the union after bargaining breaks down. In such a case, "the gist of the antitrust theory is little more than that hard bargaining by employers with unions violates the Sherman Act." Jacobs & Winter, *supra*, at 27.

D. Application of the Exemption

Based on our review of relevant Supreme Court precedent and the policies underlying both the NLRA and the Sherman Act, we conclude that injecting antitrust liability into the system for resolving disputes between unions and employers would both subvert national labor policy and exaggerate federal antitrust concerns. Accordingly, we hold that the nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining. Our conclusion dictates that the exemption bars the plaintiff class in this case from challenging the fixed salary for Developmental Squad players under the antitrust laws. The clubs and the NFL imposed the fixed salary only after negotiations over the issue reached impasse, and the fixed salary was encompassed within their pre-impasse proposals. Thus, their action was a lawful part of the collective bargaining process established by the NLRA. Further, the fixed salary operates as a restraint on competition in the labor market, specifically, the market for Developmental Squad player services, which is organized around the collective bargaining relationship between the NFL and the NFLPA. Indeed, counsel for the plaintiff class at oral argument acknowledged that the fixed salary for Developmental Squad players had no effect on the product market.[8]

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[8] Counsel acknowledged that the restraint on competition at issue in this case had no impact on the quality of professional football

In our view, the nonstatutory labor exemption requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act. If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions. We note that the NFL players took exactly this latter step after the Eighth Circuit's *Powell* decision. *See Releasing Superstars, supra,* at 883 (describing NFLPA decertification after *Powell*). Decertification also occurs when newly organized unions are unable to negotiate their first contract. We do not mean to encourage this practice, but we believe that employees, like all other economic actors, must make choices. If they choose to avail themselves of the advantages of the collective bargaining process, their protections are as defined by the federal labor laws. The system established by those statutes offers employees many benefits: recognition of organized workers as a bargaining unit, thereby

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competition, and, thus, professional football's ability to compete with other entertainment products. Specifically, counsel stated:

> [W]hat we are talking about here are the salaries that were paid to players who didn't even suit up, much less play. For them to say that somehow or other the competitive contest[s] were improved and they could compete better with ballet is like a bootstrap leap into wonderland. There is just no relationship.

Tr. of Oral Argument at 33.

As the quoted statement suggests, the clubs and the NFL contend that the fixed salary does impact the market for professional football contests, but they argue that it has the entirely procompetitive effect of improving the overall quality of NFL competition. Specifically, they assert that the fixed salary provides a disincentive for the most talented rookie and first-year players to agree to being "stashed" on the Developmental Squads of top NFL teams, and thereby makes such players available to less successful teams that need their services immediately. *See* Brief of Appellants at 8-9, 39-40. Significantly, neither party ever has argued that the fixed salary for Developmental Squad players has any *anticompetitive* impact on the market for the NFL's product—the only market involved in this case with which the Sherman Act is concerned.

giving them bargaining strength; establishment of mandatory subjects of bargaining; protection of the right to strike; allowance for the possibility of negotiated grievance procedures and pooled benefit plans; and judicial enforcement of collective bargaining agreements. Further, it establishes a significant list of employer actions that, if taken, constitute unfair labor practices for which employees and unions may seek redress before the NLRB. However, under the system established by the federal labor laws, employees win concessions not by filing antitrust lawsuits, but with shrewd bargaining, favorable grievance settlements, victories in arbitration, and, when necessary, by striking.

We recognize that the history of bargaining between the NFL and the NFLPA, which includes a failed strike by the players during the 1987 season, has prompted some commentators to conclude that "[t]he union cannot effectively strike." Ed Garvey, *Foreword To The Scope Of The Labor Exemption In Professional Sports: A Perspective On Collective Bargaining In The NFL*, 1989 DUKE L.J. 328, 337 (1989); *see also* Lock, *supra*, at 354-59 (discussing factors creating "an inherently unequal bargaining relationship between players and owners" in professional football). While we express no opinion on the NFLPA's ability to win the concessions it desires through organized activity, we reject the notion that an inequality of bargaining power in *any* industry justifies judicial intervention under the auspices of the Sherman Act. Federal labor law guarantees a process, not any particular result. Thus, it does not "contain a charter for the National Labor Relations Board"—or, we believe, for the courts—"to act at large in equalizing disparities of bargaining power between employer and union." *Insurance Agents' Int'l Union*, 361 U.S. at 490.

In this regard, we think the recently resolved labor dispute in the National Hockey League illustrates that collective bargaining, instead of litigation, can operate as an effective means of union-employer dispute resolution

in professional sports. On January 11, 1995, after a 103-day lockout, professional hockey's players and owners agreed upon a new collective bargaining agreement. Neither side received everything it wanted. Club owners yielded on the issue of a player salary cap. Players were required to accept limits on free agency. *See generally* Len Hochberg, *Last-Minute Deal Saves NHL Season*, WASH. POST, Jan. 12, 1995, at A1. Such is the nature of the collective bargaining process. Most importantly, however, the league now is operating pursuant to terms endorsed by both sides—not terms dictated by a federal court. While this model for dispute resolution may not be perfect, Congress has selected it to govern labor relations in this country, and it certainly is more balanced than the system that would prevail in professional football if its players were free to wield the threat of Sherman Act liability as a negotiating tool.

III. CONCLUSION

In sum, the clubs and the NFL are exempt from Sherman Act liability in this case. Our holding does not mean that, freed of the threat of treble damages, employers will henceforth seek to force every set of negotiations with employees to impasse so that they may unilaterally implement the employment terms they desire. Employers always face the threat of a strike for such actions. Perhaps more importantly, they face the pressures toward settlement that inhere in an ongoing employer-employee relationship in which each side needs the other to accomplish its goals.

> Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion.

Archibald Cox, *The Duty To Bargain In Good Faith*, 71 HARV. L. REV. 1401, 1409 (1958).

Nor does our holding mean that the antitrust laws are completely without force where labor agreements are at issue. Employers and unions certainly face liability when they conspire to use a collective bargaining agreement as an economic weapon against their competitors in the product market. *See, e.g., Pennington*, 381 U.S. at 665-66; *Allen Bradley*, 325 U.S. at 808. However, where, as here, an alleged restraint on competition imposed through the collective bargaining process affects only the bargaining parties, and has no impact on the product market, the nonstatutory labor exemption shields those parties from antitrust liability. Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

WALD, *Circuit Judge*, dissenting: Today the majority holds that the so-called "nonstatutory labor exemption" totally immunizes employers from antitrust liability when they unilaterally impose industry-wide terms of employment, in restraint of competition in the labor market, so long as the employers have previously engaged in unsuccessful collective bargaining with their employees over those issues. In so holding, the majority decides that employees who exercise their statutory rights to bargain collectively automatically forfeit antitrust rights to which they otherwise would be entitled. Thus, employees must now choose between foregoing collective bargaining altogether, thereby retaining antitrust protection against employer restraints on the labor market; or engaging in collective bargaining at the risk of forfeiting all antitrust remedies if bargaining fails and the employers unilaterally foist unagreed-to industry-wide terms upon them.

The majority insists its ruling does no more than maintain a level playing field in employer-employee relations and carry out the congressional mandate favoring collective bargaining as the primary means of resolving labor disputes. I do not think so. The reality is that today's decision sharply tilts the playing field in employers' favor, and because of that, will erode the vitality of collective bargaining itself. The rule announced today gives multiemployer groups both renewed incentives and unprecedented power to impose industry-wide terms of employment regardless of union consent and without fear of antitrust liability. Multiemployer groups will enjoy new freedom to harden bargaining positions, secure that if the employees do not submit at the bargaining table, the employers may impose their negotiating proposals after bargaining has irretrievably stalled. Employees in a weak bargaining position will likely opt in favor of clinging to antitrust protection as the less risky course of action; these employees will henceforth have powerful incentives *not* to engage in collective bargaining at all, since any collective bargaining opens the door to employer imposi-

tion of labor market restraints if bargaining fails. It could in extreme cases drive employees to decertify their unions, as the only guarantee against threats by multiemployer groups to unilaterally impose industry-wide wage caps and unacceptable working conditions.

All this suggests less, not more, collective bargaining and fewer, not more, successfully negotiated collective bargaining agreements. The majority decision thus poses a threat to the central purpose of our labor laws of promoting collective bargaining as the primary vehicle for ensuring labor peace. This result neither harmonizes labor law with antitrust law, nor comports with the congressional design of our statutory labor law regime.

I. Applicability of Antitrust Laws to Restraints on the Labor Market

Absent special statutory or judge-made exemption, a multiemployer agreement unilaterally imposing uniform industry-wide terms of employment, and thereby restraining competition in the labor market, runs afoul of the antitrust laws.[1] Concededly, employer-imposed restraints on the labor market are most prominent in professional sports. Employers in other fields generally favor open competition in the labor market, believing that, in the absence of chronic labor shortages, competition for jobs will

[1] The majority characterizes the players' position as an illbegotten effort to "import" and "inject" antitrust principles into collective bargaining. Majority opinion ("Maj. op.") at 15, 18. This of course turns the question inside-out. Historically and logically, antitrust comes first; the antitrust statutes antedate our labor laws and are of general applicability, applying to labor markets unless some statutory or judge-made exemption creates an exception. The question before us then, is whether we should now *extend* a judicially-created exemption from antitrust coverage for collective bargaining agreements into the previously uncharted territory of post-collective bargaining imposition of the employers' terms. Thus we might better ask to what extent we must "import" and "inject" labor law practices beyond the collective bargaining context into antitrust laws that would otherwise apply.

generally hold down wages and produce higher quality and better motivated workers. Historically, restraints on competition in the labor market have originated in employees' attempts to counter this downward pressure on wages through collective bargaining agreements fixing uniform wages and terms of employment. In professional sports, however, the situation is reversed. Because top-level athletic talent is scarce, competition tends to drive salaries up, at least for the top performers. Thus professional athletes have sought to maximize competition among employers for their unique athletic skills.[2] Predictably, the owners have reacted with multiemployer efforts to restrain competition for professional athletes' services.[3] *See, e.g., Flood v. Kuhn*, 407 U.S. 258 (1972)

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[2] Ironically, athletes have sought to achieve employer competition through the same collective bargaining processes that other employees use to *restrain* labor market competition. Players' unions typically bargain for such mobility-enhancing and competition-maximizing measures as "free agency" and the elimination of reserve clauses, salary caps and player drafts. Simultaneously, however, players' unions have embraced more traditional union demands such as league-wide minimum salaries and standardized pension plans. *See* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 341 n.12.

[3] I express no opinion as to whether these labor market restraints actually violate the antitrust laws. In most cases, a rule of reason analysis will decide, *see Smith v. Pro Football Inc.*, 593 F.2d 1173, 1182-83 (D.C. Cir. 1978), requiring a fact-specific judgment as to whether the procompetitive benefits, if any, of the labor market restraint outweigh its anticompetitive costs. In the present case, appellants colorably argued below that the wage restraint imposed on rookie and first-year nonroster players was necessary to enhance on-field "competitive balance" among teams, thereby making NFL football a more attractive and economically competitive entertainment product. *Cf. NCAA v. Board of Regents*, 468 U.S. 85 (1984). The district court may have erred in ruling such alleged procompetitive benefits "irrelevant" and granting summary judgment to the players on the question of antitrust liability. Although the majority does not reach the question, I would be inclined to remand for further proceedings on the question of antitrust liability under rule of reason analysis.

(baseball "reserve clause"); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (football "Rozelle rule" limiting player mobility); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976) (football player draft), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979) (hockey reserve system); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987) (basketball draft, salary cap, and right of first refusal).

Nonetheless, it is important to remember that multiemployer labor market restraints are not entirely confined to professional sports, so that today's majority rule has implications beyond the football gridiron. In *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926), the Supreme Court held that an industry-wide agreement setting uniform terms and conditions of employment for seamen was subject to antitrust scrutiny. Lower courts have similarly recognized that the antitrust laws presumptively apply to employer-imposed restraints on labor markets. *See, e.g., Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 742-43 (9th Cir. 1984) (multiemployer agreement not to hire "whistleblowers"); *Hennessey v. NCAA*, 564 F.2d 1136, 1147-51 (5th Cir. 1977) (multicollege agreement to limit employment of athletic coaches); *Newberger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1082 (2d Cir.) (employee noncompetition clauses), *cert. denied*, 434 U.S. 1035 (1977); *Quinonez v. National Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 827-28 (5th Cir. 1976) (multiemployer blacklisting agreement); *Nichols v. Spencer International Press*, 371 F.2d 332, 334 (7th Cir. 1967) (multiemployer "non-switching" agreement restricting mobility of employees); *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970) (multiemployer action to reduce compensation paid to securities brokers), *later opinion sub nom. Jacobi v. Bache & Co.*, 377 F. Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). *See also*

Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949) (L. Hand, J.) ("[W]hatever other conduct the [antitrust] Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids anyone to practice his calling.").

Admittedly, a few commentators have suggested that antitrust laws should not apply to restraints on labor markets. *See, e.g.*, Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 254-55 (1954); Milton Handler, *Labor and Antitrust: A Bit of History*, 40 ANTITRUST L.J. 233, 235 (1971); Theodore J. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 606 (1976). They argue that, despite the broad language of the antitrust statutes prohibiting *every* restraint on trade, the central purpose of the antitrust laws is not to promote competition *per se*, but to protect consumers from anticompetitive practices. *See generally* ROBERT BORK, THE ANTITRUST PARADOX (1978). Thus if an anticompetitive restraint affects only input markets, *e.g.*, labor, and not output markets, *e.g.*, products, it should not be subject to antitrust scrutiny. *See, e.g.*, Elinor R. Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOKLYN L. REV. 1 (1983) (tracing distinction between input and output markets to legislative history of Sherman Act).

It is, however, not possible to square this minority view with the development of our antitrust jurisprudence. *See* II PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶¶ 338b & 338c (1978) (employer agreements restricting the labor market are subject to antitrust liability); James M. Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. PA. L. REV. 127 (1982) (reviewing cases and common law antecedents, concluding that employer restraints on labor markets are subject to antitrust laws). The Supreme Court has clearly held that

antitrust laws apply not only to restraints on *output* markets, but to *input* markets as well, including both labor, *Anderson, supra; Radovich v. National Football League,* 352 U.S. 445 (1957), and input commodities, *e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948) (sugar refiners' agreement to fix input prices paid for sugar beets violates Sherman Act, which "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers" but instead "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated"). *See also United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 (1940) (Sherman Act prohibits any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity" and agreements to make "purchases [of inputs] at or under the market are one species of [unlawful] price-fixing"); *American Tobacco Co. v. United States,* 328 U.S. 781 (1946) (applying antitrust law to restraints on input market for tobacco as well as output market for tobacco products); *Swift & Co. v. United States,* 196 U.S. 375 (1905) (same, for livestock inputs and meat outputs). *Cf. National Macaroni Mfr's Ass'n v. Federal Trade Comm'n,* 345 F.2d 421, 426 (7th Cir. 1965) (purpose and effect of agreement to fix composition of macaroni product was to depress input price of semolina, thereby violating Sherman Act).

Economists too have long recognized that market inefficiencies created by anticompetitive restraints on input markets can be as destructive of a free market economy (and therefore ultimately damaging to consumers) as restraints on output markets. *See, e.g.,* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY 36-43 (1993); *see also Mandeville Farms,* 334 U.S. at 241-44 (describing how restraints on input market adversely affect output market). While antitrust prosecutions for restraints on in-

put markets are relatively rare, this is explained by the fact that restraints on input markets arise only in the unusual circumstance of an effective monopsony—a single purchaser, or a group of purchasers acting in concert. And monopsony in turn arises only when the resource is uniquely valuable *in its current use,* so that even if the price is depressed by monopsony, sellers are unable to find alternative buyers. RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST 150 (1981) (monopsony can arise when "resources hav[e] substantially greater value in some uses than in others" so the "sole purchaser . . . will . . . be able to force the [seller] . . . to accept a monopsony price"); BLAIR & HARRISON, *supra,* at 43-44 (inelasticity of supply facilitates collusive monopsony). Thus, for example, in the *Mandeville Island Farms* case, the sugar refiners' monopolistic price-fixing scheme was effective because growers could not easily find other buyers or profitably switch to other crops when refiners conspired to fix the price of sugar beets. *See* 334 U.S. at 240-42. Nonetheless, according to the economists, there is a deadweight loss associated with imposition of monopsony pricing restraints. Some producers will either produce less or cease production altogether, resulting in less-than-optimal output of the product or service, and over the long run higher consumer prices, reduced product quality, or substitution of less efficient alternative products. *See, e.g.,* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 1.2, at 17-18 (1985)); BLAIR & HARRISON, *supra,* at 42-43, 72. So, even proceeding from the premise that antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview because monopsonistic practices will eventually adversely affect consumers.

Athletic prowess is, of course, a unique and highly specialized resource, of precisely the genre vulnerable to monopsony manipulation. With a few notable exceptions, athletes typically excel in a single sport, and their labor

has greater market value in that sport than in any other profession. If team owners join together to suppress the price of athletic services through monopsony practices, most athletes will not be able to switch profitably to other lines of work. Thus, the labor market for professional athletes' services is one of a very few areas where there is real potential for anticompetitive monopsonistic practices. BLAIR & HARRISON, *supra*, at 72. Economic theory tell us, however, that monopsony will diminish output over time. Because *some* talented athletes *will* switch to other sports or other professions, or decided not to enter the field, the overall quality of athletic performance in the sport will then decline, to the detriment of consumers. Thus, both legal precedent and economic theory instruct that—absent some special exemption—antitrust principles do and should apply to such monopsonistic practices. As the majority acknowledges, Maj. op. at 23, professional athletes presumptively have antitrust protection against monopsonistic restraints on the market for their services,[4] *as long as they forego collective bargaining with their employers.*

In sum, antitrust law has a significant role to play as an antidote to anticompetitive restraints on labor markets. That role should be ousted only as necessary to implement clear congressional directives.

II. THE STATUTORY AND NONSTATUTORY EXEMPTIONS

Our next inquiry is whether any special exemption—statutory or judge-made—applies to immunize labor market restraints from expected antitrust scrutiny. In resolving this question, we are informed by the familiar nostrum that "exemptions from the antitrust laws are to be narrowly construed," *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). This princi-

[4] Baseball is an exception for historical reasons. *See Flood v. Kuhn*, 407 U.S. 258 (1972).

ple applies equally to express and implied exemptions. *Id.* Implied exemptions to the "fundamental national policies embodied in the antitrust laws," *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973), in particular, should be found "only if necessary to make the [conflicting statutory scheme] work, and even then only to the minimum extent necessary," *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

The so-called statutory labor exemption is clearly inapplicable here. The "statutory exemption" is embraced in two enactments: sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, enacted in 1914, exempting unions from coverage of the Sherman Act and prohibiting the issuance of injunctions against specified labor activities; and sections 1 through 15 of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, enacted in 1932, barring federal courts from enjoining certain other specified union activities. "These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws." *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 621-22 (1975). The statutory labor exemption thus shields unions and specified union activities. *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 713-15 (1981). Section 4(b) of the Norris-LaGuardia Act, however, does bar injunctions against "any person or persons participating in or interested in [a labor] dispute . . . [b]ecoming or remaining a member of . . . any *employer* organization. . . ." 29 U.S.C. § 104(b) (emphasis added). Thus, the statutory exemption appears to immunize membership in a multiemployer bargaining unit. *See California State Council of Carpenters v. Associated Gen'l Contractors*, 648 F.2d 527, 544-45 (9th Cir. 1980), *rev'd on other grounds*, 459 U.S. 519 (1983). But beyond bare membership, the Clayton and Norris-LaGuardia Acts do not identify any

protected class of multiemployer *conduct*. This is in marked contrast to their detailed specifications of protected union and employee conduct. *Id.* at 534-36. The multiemployer conduct at issue in this case therefore falls beyond the narrow scope of any statutory labor exemption.

The only other possible source of exemption from the antitrust statutes is the nonstatutory labor exemption, a judicially-created doctrine that attempts to harmonize the potentially inconsistent requirements of labor law and antitrust law. "The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell*, 421 U.S. at 622. Because the exercise of labor law rights and duties—generally encouraging *collective* action—may be inconsistent with prohibitions on concerted action of any kind under the antitrust laws, courts have carved out an implied exemption to antitrust coverage. Courts presume that Congress implicitly intended to exempt from antitrust scrutiny those concerted activities explicitly authorized by labor laws that are essential to collective bargaining. The prime example is the ordinary collective bargaining agreement. Although no statutory exemption shields such agreements from antitrust scrutiny, the collective bargaining scheme established by the national labor laws would be mortally undercut if collective bargaining agreements were subject to collateral attack under the antitrust laws as "combinations in restraint of trade." *See Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., Inc.*, 381 U.S. 676, 689 (1965) (Opinion of White, J.) ("Employers and unions are required to bargain about wages, hours, and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects."); *id.* at 711-12 (Opinion of Goldberg, J.) ("To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme.").

The few cases in which the Supreme Court has addressed the nonstatutory labor exemption involved employer-employee agreements which also had discernible anticompetitive effects on product output markets. *See United Mine Workers v. Pennington,* 381 U.S. 657 (1965) (exemption does not apply to agreement to impose uniform industry-wide terms on employers not party to the agreement); *Jewel Tea,* 381 U.S. at 676 (exemption applies to agreement limiting marketing hours despite ancillary anticompetive effect on product market, where restraint is tailored to protect direct interests of bargaining unit members); *Connell,* 421 U.S. at 635 (exemption does not apply to agreement barring subcontracting to nonunion subcontractors). As the majority accurately notes, several of these cases held the nonstatutory exemption inapplicable when its primary purpose or effect was to restrain product output markets. Maj. op. at 14-15. But nothing in these cases supports the majority's reverse contention that antitrust law is totally unconcerned with labor markets once collective bargaining has been undertaken but failed to resolve the dispute. In truth, Supreme Court precedent is wholly inconclusive as to whether the nonstatutory labor exemption embraces anything like the unilateral employer-imposed labor market restraints at issue here. At best, the relevant Supreme Court cases establish only that there *is* a nonstatutory labor exemption, and that its umbrella protects at least some employer-employee *agreements,* while others, *i.e.,* those whose primary purpose or effect is to restrain product output markets, are not immune.

Two sister circuits have recently adopted expanded interpretations of the nonstatutory labor exemption to cover post-impasse situations similar to the one here. *See National Basketball Association v. Williams,* 45 F.3d 684 (2d Cir. 1995); *Wood v. National Basketball Ass'n,* 809 F.2d 954 (2d Cir. 1987); *Powell v. National Football League,* 930 F.2d 1293 (8th Cir. 1989), *cert. denied,* 498 U.S. 1040 (1991). But other courts have refused to

extend it beyond employer-employee agreements. *See e.g., McCourt*, 600 F.2d at 1197-98; *Bridgeman*, 675 F. Supp. at 964-65; *Smith*, 420 F. Supp. at 741-42.

Precedent is of limited assistance, then, in deciding whether to extend the nonstatutory exemption doctrine to the situation at hand. Striking the appropriate balance requires us to go further and examine the underlying policies and principles of both labor law and antitrust law, effecting "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets," *Connell*, 421 U.S. at 622.

The majority presses a deceptively simple solution: whenever antitrust coverage potentially overlaps with activities authorized by labor law, and only the labor market is affected by the challenged restraint, antitrust law must give way. The majority's is a bright-line rule, no mistake. Additionally, it keeps federal courts out of messy labor-management disputes. There is much to be said for the twin virtues of economy and elegance, but they may be purchased at too high a price—in this case the substantial interests of players and fans in guarding against uncontrolled labor market restraints. Over the long haul, the majority's approach will not serve the interests of labor law by promoting collective bargaining. And it certainly will not comport with our judicial duty to carve out only the narrowest antitrust exemption compatible with the effective implementation of the labor laws.

III. Maintaining the Employer-Employee Balance

The majority insists its rule granting employers an antitrust exemption for terms unilaterally imposed after a bargaining impasse is required so that employers can engage in hard bargaining as permitted by the labor laws, and thereby "preserve the delicate balance of countervail-

ing power," Maj. op. at 18, that is necessary to keep unions from gaining the upper hand. The majority rightly points out that the labor laws contemplate a system of countervailing economic pressure between employers and employees, under which both sides have incentives to bargain. *See* Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the NLRA*, 115 U. PA. L. REV. 1195, 1196 (1967). But we must also be mindful that "a primary purpose of the National Labor Relations Act was to redress the perceived *imbalance of* economic power between labor and management . . . by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965) (emphasis added). Once Congress established this scheme, it contemplated that neither the courts nor the National Labor Relations Board would intervene on a case-by-case basis to adjust the parties' relative bargaining power, but rather leave them to fight it out at the bargaining table. *American Ship Bldg.*, 380 U.S. at 317-18; *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 497-500 (1960). Of course, Congress itself from time to time adjusts the balance, as it did in enacting the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1957, further limiting union conduct. *Insurance Agents*, 361 U.S. at 500.

In my view, the majority's rule does much more than "preserve the delicate balance" in labor-management relations already established by labor law. It decisively tips the balance by giving employers important *new* rights, together with new incentives to harden their bargaining positions. Because employers can now unilaterally impose labor market restraints that heretofore might have exposed them to antitrust liability,[5] the majority's rule provides

[5] The applicability of antitrust law to unilaterally-imposed terms of employment was not a settled question prior to today's decision. But since antitrust coverage *presumptively* applies to labor markets

new incentives to raise the stakes in bargaining in hope of winning industry-wide labor market restraints that might never before have been attempted. It also encourages employer groups to hang tough on their demands, since at impasse they may be able to impose any bargaining proposals the employees have rejected without fear of antitrust liability. The majority's rule does not just *protect* hard bargaining; it positively *encourages* it. It makes impasse more likely and successful collective bargaining *less* likely.[6]

On the employees' side, the majority's rule also creates new incentives, none of them helpful to the bargaining process. First, some employees—especially those in a weak bargaining position—are under pressure *not* to enter into collective bargaining at all, lest the existence of a

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absent a special exemption, and no exemption clearly applied before today, it is fair to say that until now employers at least had to contemplate the *risk* of antitrust liability if they unilaterally imposed industry-wide terms of employment.

[6] A related concern is that some employers may be emboldened to go beyond *hard* bargaining and engage in "surface bargaining," merely "going through the motions of negotiating," *K-Mart Corp. v. NLRB*, 626 F.2d 704, 706 (9th Cir. 1980), in order to position themselves to unilaterally impose industry-wide labor market restraints when the bargaining fails. Surface bargaining is a form of bad-faith bargaining which "is often difficult to detect," *Seattle-First Nat. Bank v. NLRB*, 638 F.2d 1221, 1227 n.9 (9th Cir. 1981), because, as we noted in *NLRB v. Cauthorne*, 691 F.2d 1023, 1026 n.5 (D.C. Cir. 1982), the duty to bargain in good faith does not prohibit an "employer's adamant insistence on pro-management terms," and "neither side is required to agree to a proposal or make concessions." Thus it will often be difficult to distinguish bad faith from mere good-faith "adamant insistence" on favorable terms. But whether or not some employers bargain in bad faith, the majority's rule clearly shifts the terms of employers' calculations: entering bargaining confident of their ability to circumvent the constraints of the antitrust laws either through employees' capitulation or through post-impasse unilateral imposition of terms may not be bad faith, but merely a reasonable calculation as to the likely outcome of the negotiation process.

bargaining relationship license unilateral employer imposition of anticompetitive terms. *See* Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-sports Markets,* 1989 UTAH L. REV. 617, 658-59 (describing disincentives to collective bargaining if unilaterally-imposed terms are exempt from antitrust coverage). Second, as the majority recognizes, Maj. op. at 28, some employees will be encouraged to decertify their unions rather than risk unilateral multiemployer imposition of terms at impasse. *See also* Goldman, *supra,* at 658-59. Such a consequence is not mere speculation, but represents the actual upshot of the Eighth Circuit's decision in *Powell* upholding a broad nonstatutory labor exemption like that of the majority here. Faced with anticompetitive industry-wide terms forced upon them without their consent, the players in *Powell* promptly responded by terminating union representation. *See Powell v. National Football League,* 764 F. Supp. 1351 (D. Minn. 1991) (recognizing termination of nonstatutory labor exemption when NFL players voted to end union representation in response to *Powell* decision); *The Five Smiths, Inc., et al. v. National Football League Players Ass'n,* No. Civ. 3-90-177 (D. Minn., filed Mar. 30, 1990) (suit by NFL seeking judicial invalidation of players' union decertification). New incentives for employees not to engage in collective bargaining—and the bizarre prospect of employers attempting to force employees to remain in a union so as to preserve the employers' valuable antitrust exemption—run directly contrary to the overarching purpose of the labor laws to encourage bona fide collective bargaining.

The majority seems to suggest that because the labor laws mandate a *process* and not an *agreement,* Maj. op. at 16, 18, we should not be concerned if the rule ends up encouraging more nonagreements than agreements. I do not see how they can be right. "The basic theme of

. . . [the National Labor Relations] Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). A rule that ousts antitrust law only to encourage fewer collective bargaining agreements seems contrary to the purposes of *both* the labor laws and the antitrust laws.

The majority's rule also creates new assymetries in bargaining relationships still in effect. Employers, now shielded from antitrust liability, can unilaterally impose terms restraining the labor market, while employees have no such capability because unions do not hold sufficient economic power to unilaterally force terms on unwilling employers. *See* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1424 (1958). Prior to today's ruling, employers and employees could *jointly* agree to restraints on the labor market through collective bargaining agreements, and those restraints would be free from antitrust scrutiny. In that limited sense, employees had the right to bargain away (or waive) their antitrust protection, but always with the prospect of getting something in return. Employers could also acquire antitrust immunity for labor market restraints through the *quid pro quo* of collective bargaining. But today's ruling "effectively gives the party benefitting from a potentially anticompetitive restraint [*i.e.*, employers] . . . the benefit of the antitrust exemption without having to pay for it" through concessions at the bargaining table, Brief of the United States as Amicus Curiae Opposing [sic] *Certiorari* in *NFL v. Powell* ("Amicus br."), at 15. The symmetry, mutality, and give-and-take that lie at the heart of the bargaining process are irretrievably lost.

Under the majority's rule it is clear that a multiemployer agreement setting industry-wide uniform terms of employ-

ment in a single industry— precisely what was prohibited in *Anderson v. Shipowners' Ass'n*—would be exempt from antitrust scrutiny, provided the employers first proposed the scheme in collective bargaining and implemented it after impasse. Until today, the shipowners could immunize those industry-wide terms from antitrust scrutiny only through a collective bargaining agreement; after today, the shipowners need give nothing up in order to get around the antitrust roadblock. Rather than being in a position to demand a *quid pro quo* for their assent to the employers' proposed terms, the employees must now either strike or make concessions to prevent the employers from doing what the antitrust laws would have previously deterred them from doing. The employers thus enter collective bargaining in a stronger position, and the employees enter in a commensurately weaker position. Although strong unions may still be able to successfully fend off employers' unilateral imposition of terms, even the strongest unions are left in a weaker bargaining position after today's ruling. *See* Goldman, *supra*, at 661.

In the end, the wide open field given employers by so broad an exemption from antitrust laws cannot be justified by any rationale based on the requirements of collective bargaining.

IV. "Terms" Versus "Tactics"

The majority's analysis goes astray, I believe, by relying on a too-facile equation of *terms* of employment that restrain the labor market and are unilaterally imposed by employers at impasse, with "bargaining *tactics*," "hard bargaining," and the "economic weapons" used by each side in jockeying for position at the bargaining table. Unilaterally-imposed terms are not mere bargaining tactics. *See* Goldman, *supra*, at 682-83 (distinguishing bargaining "tactics" from unilaterally-imposed "terms" and urging nonstatutory exemption for "tactics" but not for "terms"); Leonard L. Scheinholtz & Kenneth C. Ketter-

ing, *Exemption Under the Antitrust Laws for Joint Employer Activity*, 21 DUQUESNE L. REV. 347, 354 (1983) (distinguishing multiemployer bargaining "tactics" from "terms"). It is true, of course, that "the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining," *Insurance Agents*, 361 U.S. at 495, and the Supreme Court itself has suggested that post-impasse unilateral imposition of terms may qualify as an economic pressure tactic, *see American Ship Bldg.*, 380 U.S. at 316 (dicta). Still, the statutory structure of the National Labor Relations Act and the logic of collective bargaining suggest that an employer's right to unilaterally impose terms after impasse is best understood not as a "bargaining tactic" but as part of the employer's residual right to continue operating as dictated by business necessity once her statutory duty to bargain has been exhausted, *see NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 480-81 & n.20 (5th Cir. 1963). Prior to enactment of the NLRA (and even today outside the collective bargaining context), employers remained free to unilaterally impose new terms of employment at any time; but those unilaterally-imposed terms were subject to antitrust scrutiny. The NLRA, however, restricts an employer's freedom to unilaterally impose terms. The employer's central duty under § 8(a)(5) of the NLRA is to bargain in good faith over mandatory subjects of bargaining. *See* Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 500 (1981). To give substance to that obligation, § 8(a)(5) has been interpreted to prohibit an employer from unilaterally imposing at impasse new terms *not* previously submitted to collective bargaining and rejected by the union, for to do so "is necessarily inconsistent with a sincere desire to conclude a[ ] [collective bargaining] agreement," *NLRB v. Katz*, 369 U.S. 736, 745 (1962). Moreover, because unilateral imposition of new terms during bargaining

"tends to subvert the union's position as the representative of the employees," *Insurance Agents*, 361 U.S. at 485, the employer must observe the status quo while bargaining continues. But after impasse, the employer is free to unilaterally impose terms reasonably encompassed in bargaining proposals already rejected by the union, *Katz*, 369 U.S. at 745, because at that point the employer has *exhausted* its statutory duty to bargain, *Taft Broadcasting*, 163 N.L.R.B. 475, 478 (1967), ("[A]fter bargaining to impasse, that is, *after good-faith negotiations have exhausted the prospects of concluding an agreement*, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals") (emphasis added), *petition for review denied sub. nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) ("*AFTRA*"); *AFTRA*, 395 F.2d at 628; *NLRB v. McClatchey Newspapers, Inc.*, 964 F.2d 1153, 1157 (D.C. Cir. 1992) (at impasse, "the duty to bargain is at least temporarily suspended, and the parties, typically the employer, may enact any change in a mandatory subject [of bargaining] reasonably contained within its final proposal").

Why then is it necessary, or even helpful in advancing the collective bargaining process, to grant additional antitrust immunity to terms unilaterally imposed by the employer as part of his residual right to conduct his business, *after* he has been relieved of his statutory duty to bargain? I should think that the antitrust interest in unilaterally-imposed industry-wide terms remains as great after impasse, when the employer's duty to bargain over those terms has ceased under the labor laws, as at any other time. Congress could, of course, assign some new, significant *labor law* role to an employer's right to unilaterally impose terms at impasse, such that the terms must be immune from antitrust scrutiny. But the majority can point to nothing in the statute or in its legislative history to support any such intention. *See* Amicus br. at

13. ("The text of the NLRA does not mention the antitrust laws, and the legislative history demonstrates no intent to restrict the preexisting rights of workers as the price of participation in a collective bargaining relationship. . . ."). In short, there is simply no fundamental conflict between the well-established interest of the antitrust laws in preventing employers from unilaterally imposing restraints on the labor market through anticompetitive terms, and the interest of the labor laws in promoting collective bargaining.

Despite the majority's rhetoric, terms of employment unilaterally imposed at impasse bear little resemblance to "bargaining tactics," even extreme ones like strikes and lockouts.[7] Unlike terms of employment, strikes and lock-

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[7] Although the question is not directly at issue in this case, I share the majority's view that if the collective bargaining process is to work without undue interference from antitrust law, multiemployer "bargaining tactics" must fall within the scope of the nonstatutory labor exemption. *See* Maj. op. at 25-26. Although multiemployer bargaining is not expressly authorized by the National Labor Relations Act, neither is it prohibited, and the fact that multiemployer bargaining predates the Act strongly suggests that it was contemplated as part of the collective bargaining process. *NLRB v. Truck Drivers Union Local 449*, 353 U.S. 87, 94-95 (1957) (*"Buffalo Linen"*); *see also Williams*, 45 F.3d at 688. Multiemployer bargaining strengthens the bargaining process not only by facilitating bargaining on the employers' side, *Buffalo Linen*, 353 U.S. at 94-95 and allowing employers to counter "whipsaw" tactics by unions *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 409-10 & n.3 (1982), but it also makes available joint benefit programs and frees unions from the burden of negotiating separately with many small employers. *Id.* Thus the statutory scheme of the NLRA may well require that employers be exempt from antitrust liability for basic bargaining tactics such as joining multiemployer bargaining units; developing joint bargaining positions jointly proposing and negotiating for those positions; and for joint actions, such as lockouts, aimed at pressuring the union in hopes of securing an agreement. *Cf. Jewel Tea*, 381 U.S. at 713 (Opinion of Goldberg, J.) (suggesting multiemployer bargaining must be exempt from antitrust laws); *Volkswagenwerk v. Federal Maritime Comm'n*, 390 U.S. 261, 287 n.5 (1968) (Harlan, J., concurring) (it is

outs have instrumental value only *within the bargaining context*, as tools to put pressure *on the other bargaining party* to reach an agreement. Strikes and lockouts make sense only as long as hope exists that an agreement may be reached. Unilaterally-imposed terms, however, go well beyond that purpose. Although occasionally displaying ancillary "tactical" significance, unilaterally-imposed terms are inescapably *nontactical* in nature—they are simply the way the employer decides to run his business in the absence of any bargaining agreement. They are not bargaining tactics but the end-product of an unsuccessful bargaining process, addressed not to the other *bargaining party* (the union) but imposed upon the employees because the employer believes they represent good business judgment. Unilaterally-imposed terms, then, are a substitute for an agreement, not a means of reaching one.

Contrary to the majority's contention, Maj. op. at 21, the Supreme Court has repeatedly recognized this fundamental distinction between terms of employment—"the end result of bargaining"—and the "bargaining process" itself, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 752 (1985). In the analogous context of

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"obvious that the employers are not violating the antitrust laws either when they confer about wage policy preparatory to bargaining or when they sign an agreement"). *See also* Goldman, *supra*, at 674-76 (urging nonstatutory labor exemption for multiemployer bargaining tactics, but not for unilaterally-imposed terms). Indeed there is broad precedent holding multiemployer *tactical* actions directed at the *union* within a collective bargaining framework exempt from antitrust scrutiny. *See, e.g., Amalgamated Meat Cutters & Butchers Workmen, Local No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979) (agreement to supply temporary replacement workers to struck employer); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers of Amer.*, 431 F.2d 1004, 1007 (5th Cir. 1970) (alleged conspiracy to refuse to deal with union), *cert. dismissed*, 404 U.S. 801 (1971); *Newspaper Drivers & Handlers Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1978) (mutual lockout agreement), *cert. denied*, 395 U.S. 923 (1969); *Kennedy v. Long Island R. Co.*, 319 F.2d 366, 372-73 (2d Cir.) (multiemployer strike insurance pact), *cert. denied*, 375 U.S. 830 (1963).

implied preemption by the NLRA of state laws setting minimum labor standards, the Court has held that statutes setting substantive limits on *terms* of employment—including terms unilaterally imposed at impasse—do not impermissibly intrude on an employers' "lawful 'tools of economic self-help' available to be utilized as a tactic in collective bargaining," Maj. op. at 22. Earlier cases had established that state laws interfering with the exercise of self-help "economic weapons" in a labor dispute were preempted by federal labor law because they would "frustrate effective implementation of the [National Labor Relations] Act's processes," *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 148 (1976) (quotation and citation omitted); *see also Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (citing cases). In *Metropolitan Life*, employers advanced the argument—similar to the majority's conclusion here—that this implied preemption also extended to state laws establishing minimum terms of employment, on the theory that the NLRA allows employers and unions to settle terms through free exercise of the "self-help weapon[s]" that form the "balance of power between labor and management expressed in our national labor policy." *Id.* at 750-51 (citation and quotation omitted). The Court roundly rejected the employers' contention that "Congress' ultimate concern in the NLRA was in leaving the parties free to reach agreement about contract terms." *Id.* at 752. Despite the "surface plausibility to appellants' argument" that statutory minimum *terms* interfere with the bargaining *process*, *id.*, the Court said that "[t]he evil Congress was addressing [in enacting the NLRA] . . . was entirely unrelated to local or federal regulation establishing minimum *terms* of employment," and there is "[n]o incompatibility" between the purpose of NLRA to "restore the equality of bargaining power, and "state or federal legislation that imposes minimal substantive requirements on contract *terms* . . . ." *Id.* at 75 (emphasis added).

In a subsequent case, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Court held that a state statute setting minimum terms *in the absence of a collective bargaining agreement* was not preempted by the NLRA. In *Fort Halifax*, a Maine statute provided that employers and employee could alter severance pay terms from the statutory minimum through collective bargaining agreements; but *once bargaining reached impasse*, the statutory minimum terms applied. Employers again complained that the statute interfered with the collective bargaining process (including presumably their right to impose terms unilaterally at impasse), but the Court held that the statute "does not impermissibly intrude upon the collective bargaining process."[8] *Id.* at 23. As the Court explained:

> Both employers and employees come to the bargaining table with rights . . . that form a "backdrop" for their negotiations (citation omitted). Absent a collective-bargaining agreement, for instance, state common law generally permits the employer to run the workplace as it wishes. . . . The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions; that same state law defines the rights and duties of employees. . . . If impasse is reached, . . . preexisting state law determines the right[s] of employees. . . .

Id. at 21.

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[8] *Fort Halifax* thus contradicts the majority's contention, Maj. op. at 22, that this case is controlled by dicta in *American Ship-Building*, 380 U.S. at 316, naming unilateral imposition of terms among the employers' "tools of economic self-help." Even if we are bound by the *American Ship Building* dicta, *Fort Halifax*—decided later—rejects the implication the majority would draw, that any independent statutory limitation on the terms an employer may impose at impasse impermissibly interferes with the employer's exercise of self-help tools.

The principles of *Metropolitan Life* and *Fort Halifax* apply here. Federal antitrust law forms a "backdrop" against which collective bargaining takes place. The nonstatutory labor exemption allows employers and employees to alter these standards through collective bargaining agreements; but at impasse, preexisting antitrust rights apply. Here, just as in *Metropolitan Life* and *Fort Halifax*, the substantive limitations placed on *terms* of employment do not impair the collective bargaining *process*, even though they may limit employers' ability to impose the terms of their choice unilaterally at impasse.

In some cases, we are told, impasse " 'is eventually broken, either through a change of mind or the application of economic force,' " and impasse "may be 'brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process.' " *Bonanno Linen*, 454 U.S. at 412 (quoting *Charles D. Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 1093, 1093-94). But even if unilateral imposition of terms at impasse may *sometimes* have tactical significance, the majority's rule sweeps much too broadly, immunizing unilaterally-imposed terms whether or not they are used as a bargaining tactic; whether or not they break an impasse or otherwise promote further bargaining; and regardless of how identical terms, imposed for identical reasons, would fare under the antitrust laws in the absence of failed collective bargaining.

The present case offers a striking illustration of how employers may now execute an end run around the antitrust laws. Here, there is no indication that the employers' unilateral imposition of a fixed salary of $1,000 per week on rookie and first-year developmental squad players was a "tactic" or "economic weapon" aimed at bringing an intransigent union back to the bargaining table. The employers frankly admitted they wanted a $1,000 fixed salary for developmental squad players to

save money, and because they could not enforce existing prohibitions against "stashing" players on the injured reserve list. Thus their primary *purpose* for unilaterally imposing the fixed salary had nothing to do with tactical advantages in the bargaining process or pressuring the union to resume bargaining. They basically thought the new terms were a better way to run their business. The purpose, effect and content of their unilaterally-imposed terms would have been the same had there been no union in the picture at all.

V. Striking the Balance Between Antitrust and Labor Law

The majority suggests that without the rule adopted today employees will rely on antitrust litigation to secure gains they could not win at the bargaining table but were unwilling to strike over. Maj. op. at 18-19. That argument is a nonstarter.

First, the majority's rule applies whether or not the employees strike. Second, denying employers antitrust exemption for unilaterally-imposed terms does not place any new offensive plays in the employees' playbook. Rather, it affords them a defense against unilateral employer actions that offend antitrust principles. Preserving antitrust protection does not guarantee unions a win at impasse because multiemployer bargaining units still have many other options.[9] They can maintain the status quo, and employ economic pressure tactics such as joint lockouts, *Buffalo Linen*, 353 U.S. at 97, or hiring temporary

[9] In that sense, this case is distinguishable from *Williams*, where employees mounted an antitrust challenge to employers' maintenance of the status quo after expiration of a collective bargaining agreement. There, the employers' labor law duty to maintain the status quo squarely conflicted with their alleged antitrust duty *not* to maintain the status quo. Rather than deciding the case on that narrow issue, however, the *Williams* court announced a broad ouster of antitrust law, similar to the majority's here.

replacements for strikers, *NLRB v. Brown*, 380 U.S. 278, 284 (1965). A multiemployer group can be disbanded (by mutual consent with the union) upon the failure of bargaining, and each employer can resume bargaining separately. Although generally not free to unilaterally withdraw from the multiemployer bargaining unit absent "unusual circumstances," individual employers are still free to negotiate interim agreements with the union, *Bonanno Linen*, 454 U.S. at 413. Finally, even if the multiemployer group does proceed to unilaterally impose anticompetitive terms, thereby courting an antitrust lawsuit, the outcome of that litigation is far from a foregone conclusion under a rule-of-reason balancing. Under any of these scenarios, employees will be hard-pressed to gain an easy victory. Indeed, the range of choices left to employers without post-impasse antitrust immunity more closely tracks the "delicate balance" of the collective bargaining process as we now know it, than any wholesale exemption such as that announced by the majority today.

For all these reasons, I would hold ultimately, in accord with the district court, that terms of employment unilaterally imposed by employers after impasse are *not* exempt from antitrust scrutiny under the nonstatutory labor exemption.[10] Under our rule, the symmetry and mutuality of the bargaining process are preserved. Either side may propose and bargain for terms restraining the labor market, but can win those restraints only at the bargaining table by making concessions and securing agreement from the opposing side. Incentives to bargain

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[10] In reaching this conclusion, I do not find it necessary to reach some closely-related questions that have arisen in other cases. The most important of these is when, if at all, the nonstatutory labor exemption attaching to a collective bargaining *agreement* ends—at expiration of the collective bargaining agreement, at impasse, or at some other post-impasse point. Since the employees never agreed to the labor market restraints at issue here in the first place, no such questions arise in this case.

remain. But at the point of impasse—when an agreement is no longer in sight or even being sought—immunity from antitrust liability for terms employers unilaterally impose should terminate. Extending antitrust immunity undercuts the substantial interests of antitrust law in protecting the freedom of the labor market, and serves no ascertainable purpose within the collective bargaining framework.

This outcome, I believe, accomplishes a superior balancing of the competing interests of antitrust principles whenever any aspect of labor law enters the scene, it preserves antitrust protection alongside the collective bargaining process in situations where they do not fundamentally conflict. *Cf. Silver v. New York Stock Exchange*, 373 U.S. at 357 ("the proper approach [to resolving conflict between antitrust laws and a competing statutory scheme] . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted"). And it better comports with our duty to construe implied antitrust exemptions narrowly; the majority's global interpretation of the nonstatutory exemption goes far beyond what is necessary to make the collective bargaining process work. *Cf. id.* Finally, because it preserves the symmetry, mutuality, and balance of the collective bargaining process as crafted by Congress over the past 60 years, it more faithfully follows the design of our labor laws as well.

With time running out in a bitterly fought scoreless tie, this court would allow the owners an unearned critical fifth down.

I respectfully dissent.

APPENDIX B

[Filed Jun. 12, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7165

ANTONY BROWN, *et al.*,
Appellees,

v.

PRO FOOTBALL, INC. d/b/a
WASHINGTON REDSKINS, *et al.*,
Appellants

and Consolidated Case

BEFORE: Edwards, Chief Judge; Wald and Randolph, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Wald would grant the Petition for Rehearing.

[Filed Jun. 12, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-7165

ANTONY BROWN, *et al.*,
Appellees,

v.

PRO FOOTBALL, INC. d/b/a
WASHINGTON REDSKINS, *et al.*,
Appellants

and Consolidated Case

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Circuit Judges

ORDER

Appellees' Suggestion For Rehearing *In Banc* and the brief of the United States in support thereof have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Tatel concurring in the denial of rehearing *in banc* is attached.

Circuit Judge Wald would grant the suggestion. A statement by Judge Wald is attached.

WALD, *Circuit Judge*: I would grant the petition for rehearing *in banc* for the reasons set out in my panel dissent. I believe further that the case involves a significant issue of statutory accommodation between two premier pieces of legislation incorporating our national policies on labor relations and competition and as such merits final resolution by the Supreme Court.

Statement of Circuit Judge Tatel:

This case presents antitrust and labor issues of national significance. The issues have been fully engaged and developed by the majority and dissenting opinions. Supreme Court review is essential to the resolution of these issues. *See* Sup. Ct. R. 10.1(c).

APPENDIX C

[Filed Jun. 4, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1071
(RCL)

ANTONY BROWN, *et al.*,
Plaintiffs,
v.

PRO FOOTBALL, INC., d/b/a
WASHINGTON REDSKINS, *et al.*,
Defendants.

MEMORANDUM OPINION

(Striking Nonstatutory Labor Exemption Defense)

This case comes before the court on plaintiffs' motion to strike defendants' nonstatutory labor exemption defense or for partial summary judgment ("Plaintiffs' Motion to Strike"), defendants' motion for summary judgment as to the nonstatutory labor exemption ("Defendants' Motion for Summary Judgment"), and the parties' respective oppositions and replies. After consideration of all the filings, arguments, and authorities presented by both parties in their filings and at oral argument, the court will grant Plaintiffs' Motion to Strike and will deny Defendants' Motion for Summary Judgment.

I. FACTS

Plaintiffs in this action are professional football players who played on developmental squads of the twenty-eight National Football League teams during the 1989 regular

and post-season. By court order, plaintiffs have been certified as a class for purposes of the present case.[1] Defendants are each of the twenty-eight teams which comprise the National Football League and the National Football League ("NFL"), itself.

On February 23, 1989, the NFL's Long Range Planning/Finance Committee discussed the framework for establishing developmental squads of up to six players for each of the NFL teams. Plaintiffs' Statement of Material Facts Not in Genuine Dispute and Supporting Exhibits ("Plaintiffs' Exhibits") at 4. The developmental squad was a new concept which, under the terms of 1989 Resolution G-2 ("Resolution G-2"), would permit each NFL team to sign rookie and first year free agents to services contracts for the 1989 NFL season. *See* 1989 Resolution G-2 at Plaintiffs' Exhibits at 5. At its annual meeting on March 22, 1989, the NFL, *inter alia,* voted to adopt Resolution G-2 and to amend the NFL Constitution and Bylaws accordingly. Under the terms of Resolution G-2 the NFL teams would be able to sign developmental squad players beginning September 5, 1989. *Id.*

The present case and the motions currently before the court involve the compensation terms of Resolution G-2, which provided that developmental squad players would be paid a fixed salary instead of being permitted to negotiate their own salaries. While Resolution G-2 established that developmental squad players would receive one fixed weekly salary, the amount to be paid was left blank. On April 7, 1989, Jack M. Donlan, Executive Director of the NFL Management Council sent a letter and a copy of Resolution G-2 to Eugene Upshaw, representive of the NFL Players Association ("NFLPA"). The letter informed Upshaw of the NFL's adoption of Resolution G-2 and suggested an April meeting "to negotiate the terms

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[1] Named plaintiffs include Antony Brown, James Bishop, John Buddenberg, Gary Couch, Craig Davis, Matthew J. Jaworski, Ricky Andrews, and Wesley Pritchert.

and conditions applicable to developmental squad players." Plaintiffs' Exhibits at 6. On April 29, 1989, James A. Conway, Assistant Executive Director and General Counsel of the NFL Management Council wrote a letter to Richard A. Berthlesen, of the NFPLA, summarizing a telephone conservation between the two in which they briefly discussed developmental squads and requesting a face-to-face meeting in early May to discuss salary and benefit terms for developmental squad players. *Id.* at 7.

On May 17, 1989, the Executive Committee of the NFL Management Council agreed to pay developmental squad players a fixed salary of $1,000 per week. *Id.* at 8, ¶ 14. On May 18, 1989, Donlan sent Upshaw a letter again indicating the NFL Management Council's desire to meet to negotiate the terms and conditions applicable to developmental squad players and specifically proposing, *inter alia,* the following modification to the 1982 Collective Bargaining Agreement:

> Article XXII, *Salaries,* shall not apply, In lieu thereof, establish special services contract providing for salaries of $1,000 per week, prorated on a daily basis.

Id. at 9. On May 30, 1989, Upshaw faxed a letter to Donlan indicating the NFLPA's position that developmental squad players must have the right to negotiate their own salaries. *Id.* at 10. The fax also suggested a discussion of Resolution G-2 when the parties were to meet the following week. *Id.* On June 16, 1989, Donlan sent a letter to various members of one of the NFL committees summarizing the results of a meeting between the NFL and the NFLPA. *Id.* at 12. The letter indicated that the NFLPA would not agree to the plan to pay developmental squad players a fixed salary and insisted that those players be given the right to negotiate their own salaries. *Id.* In the letter, Donlan concluded that "[f]or implementation purposes, the [developmental squad] issue is clearly at an impasse." *Id.*

On June 30, 1989, Donlan sent Upshaw a letter suggesting a meeting during the second week in July. *Id.* at 15. Attached to the letter was a draft developmental squad contract. *Id.* On June 30, 1989, Donlan also wrote a file memorandum indicating that it was his understanding that the NFLPA would never accept a contract for the developmental squad players in which they were not permitted to negotiate their own salaries. *Id.* at 16. On July 6, 1989, Upshaw sent Donlan a letter which stated the NFLPA's position that "all players, including developmental, should have the right to negotiate salary terms, and that no fixed wage for any group of players is acceptable to the NFLPA." *Id.* at 18. In this letter, Upshaw also indicated that the NFLPA rejected the conditions suggested for developmental squad players which the NFL presented to the NFLPA and which included a fixed salary of $1,000 per week. *Id.*

On August 14, 1989, Conway sent a final version of the draft Developmental Player Contract to Upshaw with a letter attached indicating that the NFL was "available for negotiations on this and other issues anytime." *Id.* at 22. On September 5, 1989, the day NFL teams began signing developmental squad players, NFL Commissioner Pete Rozelle circulated a memorandum to all NFL teams reminding them that "weekly compensation to be paid to Developmental Squad Players is $1,000. Individually negotiated terms above or below $1,000 are not permitted." *Id.* at 28. The memorandum indicated that any other form of compensation or benefit, such as per diem and housing arrangements, was impermissible. *Id.* On October 17, 1989, Upshaw sent a letter to Donlan in response to one received from Donlan. In this letter, Upshaw stated the NFLPA view that the developmental squad salary cap "violates the law." *Id.* at 31. Plaintiffs, through the NFLPA, filed the present suit on May 9, 1990.

II. LEGAL STANDARDS

Plaintiffs have moved to strike defendants' nonstatutory labor exemption defense. Under Rule 12(f) of the Federal Rules of Civil Procedure, the court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Plaintiffs have moved, in the alternative, for partial summary judgment on the nonstatutory labor exemption defense. Because the court has considered matters outside the pleadings, the court will consider plaintiffs' motion under Rule 56(c), which indicates that summary judgment is appropriate when examination of the record as a whole reveals "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In examining the record, the court must view all inferences in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In order to determine whether to grant plaintiffs' motion for partial summary judgment, the court must address the nonstatutory labor exemption and its place within the collective bargaining process in the context of the present case.

III. ANALYSIS

A. *Background*

The purpose of collective bargaining is to enable employers and unions to resolve disputes among themselves without having to resort to the courts. One court has noted that the:

> labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this "level playing field" as the basis for their often tempestuous relationship, and we believe that there is substantial justification for requiring the parties to continue to fight on it,

> so that bargaining and the exertion of economic force may be used to bring about legitimate compromise.

Powell v. National Football League, 888 F.2d 559, 567 (8th Cir. 1989), *cert. denied* 111 S. Ct. 711 (1991).

The NFLPA is a labor organization under the terms of 29 U.S.C. § 152(5) and has exclusive bargaining rights for all NFL players. *See* 29 U.S.C. § 159(a) (1973). This exclusive bargaining right extends to developmental squad players insofar as they are potential NFL players: "[n]ot only present but potential future players for a professional sports league are parties to the bargaining relationship." *Zimmerman v. National Football League*, 632 F. Supp. 398, 405 (D.D.C. 1986), citing *Wood v. National Basketball Association*, 602 F. Supp. 525 (S.D.N.Y. 1984). Potential NFL players, such as the developmental squad players in the present case, are part of the collective bargaining relationship betwen the NFL and the NFLPA for purposes of the nonstatutory labor exemption. *Zimmerman v. National Football League*, 632 F. Supp. at 405.[2]

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[2] The status of plaintiffs in this case is not affected by a decision issued by a United States District Court in Minnesota which held that the NFLPA was no longer involved in a collective bargaining relationship with the NFL. *Powell v. NFL*, No. 4-87-917 (D. Minn. filed May 29, 1991). The negotiations between the NFL and NFLPA in the present case and the NFL's implementation of the developmental squad concept preceded the actions in *Powell* upon which the District Court in Minnesota based its present holding. The Minnesota District Court's holding suggested that the NFLPA's status as the players' collective bargaining representative ended on December 5, 1989—after all communications between the NFL and NFLPA on the developmental squad issue had ended and after the NFL implemented the developmental squad concept. Both parties agreed that the issue of the NFLPA's renunciation of its bargaining rights is not material to this case because all conduct material to this case occurred prior to the NFLPA's renunication. Plaintiffs' Statement Of Material Facts Not In Genuine Dispute at ¶ 4; Defendants' Response to Plaintiffs' Statement Of Material Facts Not In Genuine Dispute at ¶ 4.

In 1977, the NFL and the NFLPA entered into a collective bargaining agreement. After the 1977 Collective Bargaining Agreement expired, the parties adopted the 1982 collective bargaining agreement, which itself expired in August 1987. Currently there is no collective bargaining agreement in effect. After a collective bargaining agreement expires, both the union and the employer have a continuing obligation to bargain. National Labor Relations Act, 29 U.S.C. § 158(a)(5) & (d) (1982); *see NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). Employers are obligated to maintain the status quo as to wages and working conditions created by a previous collective bargaining agreement before the parties reach "impasse" in negotiations. *Powell v. National Football League*, 888 F.2d at 565 (citations omitted).

During the life of a collective bargaining agreement, the nonstatutory labor exemption shields both employers and labor unions from antitrust liability for restraints which involve mandatory subjects of collective bargaining[3] found in the collective bargaining agreement. If not included in a collective bargaining agreement such restraints would subject the employer to liability under the antitrust laws. *Powell v. National Football League*, 888 F.2d at 562; *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976); *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3rd Cir. 1974) ("to preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption"). The "availability of the nonstatutory exemption for a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." *Mackey v. National Football League*, 543 F.2d at 613.

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[3] Under the NLRA, mandatory subjects of collective bargaining include "wage, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d) (1973); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

The nonstatutory labor exemption is a narrow exception to antitrust liability. The purpose of that exemption is to effect an "accommodation between the congressional policy favoring collective bargaining under the National Labor Relations Act and the congressional policy favoring free competition in business markets . . . ." *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975). This accommodation "requires that some *union-employer agreements* be accorded a limited nonstatutory exemption from antitrust liability." *Id.* (emphasis added).

While the nonstatutory labor exemption normally applies to protect employers from antitrust liability where a collective bargaining agreement exists, some courts have extended that exemption beyond expiration of a collective bargaining agreement. The Court of Appeals for the District of Columbia Circuit has stated that "provisions of [an] expired collective-bargaining agreement that relate to mandatory subjects [of collective bargaining] are said to survive the agreement's expiration." *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986). Wages being one of the mandatory subjects of collective bargaining, an "expired collective bargaining agreement continues to define the status quo as to wages and working conditions and the employer is required to maintain the status quo until the parties negotiate to a new agreement or bargain in good faith to impasse." *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982) (citations and internal punctuation marks omitted). The Supreme Court has stated that the purpose of extending the terms of a collective bargaining agreement beyond expiration is to promote industrial peace "by fostering a non-coercive environment that is conducive to serious negotiations on a new contract." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.5 (1988), *quoting NLRB v. Katz*, 369 U.S. 736, 743 (1962).

In citing a case from this circuit, the Supreme Court has noted that "after bargaining to an impasse . . . an employer does not violate the [National Labor Relations] Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Id.*, 484 U.S. at 544 n.5, citing *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968). In *Laborers Health & Welfare Trust Fund*, the Supreme Court did not say that such unilateral changes, whether before or after impasse, would not violate the antitrust laws.[4]

B. *Nonstatutory Labor Exemption Ends At Expiration.*

The present dispute raises one principal issue for the court to resolve: whether the nonstatutory labor exemption shields the NFL from antitrust liability for its having implemented the uniform salary provisions in the developmental squad player contracts during the 1989 NFL season. This court holds that the NFL's implementation of the salary provisions of Resolution G-2 is not shielded by the nonstatutory labor exemption because that exemption expired when the 1982 Collective Bargaining Agreement expired in 1987.

While this court recognizes the precedent which establishes that the nonstatutory labor exemption survives expiration of a collective bargaining agreement, this court questions the wisdom of continued application of that court-made doctrine beyond expiration due to the fact that such an exemption hinders rather than facilitates the execution of new collective bargaining agreements. The

[4] It is important to note that the *American Federation* case cited by the Supreme Court involved a labor dispute in which there was a collective bargaining agreement in effect and that the employer sought to change mandatory subjects already encompassed in that *existing* agreement. The present case involves an expired collective bargaining agreement where the employer seeks the shelter of the nonstatutory exemption for new terms involving mandatory subjects that were never part of the expired agreement.

present case provides a good example. The NFL and NFLPA signed a collective bargaining agreement in 1982. That agreement expired in 1987. It is now 1991 and the parties have not negotiated a new collective bargaining agreement. The court has no indication as to when the parties will execute a new agreement. For the past four years, by continuing to hold parties to the terms of the expired collective bargaining agreement, courts have been treating the parties as if they had a current agreement. Such treatment results not from any legislation or express assent of the parties, but from a judicial fiction ostensibly fashioned to promote the negotiation of a new collective bargaining agreement with terms mutually acceptable to both parties.

Unfortunately, the nonstatutory labor exemption actually provides a disincentive for the NFL to sign a new collective bargaining agreement. If the NFL is satisfied with the terms in the expired agreement, all it need do is maintain the status quo and continue to receive exception from antitrust liability for restraints to which the union no longer agrees. As mentioned earlier, the stated purpose of extending the terms of an expired collective bargaining agreement was to foster a "non-coercive environment that is conducive to serious negotiations on a new contract. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 544 n.5, *quoting NLRB v. Katz*, 369 U.S. at 743. Rather than creating an atmosphere conducive to serious negotiations, extension of the terms of an expired collective bargaining agreement and the nonstatutory labor exemption beyond expiration of the agreement actually discourages serious negotiations on a new collective bargaining agreement. As long as the employer is satisfied with the status quo, that employer has no incentive to negotiate a new agreement. Moreover, such an extension apparently removes the firm deadline necessary for fruitful negotiation. The certainty that treble damages under the antitrust laws would attach after a date certain would create

the atmosphere of economic certainty and urgency necessary for the parties to negotiate seriously and sign a new collective bargaining agreement.

In *Powell v. National Football League,* 888 F.2d at 564, a panel of the Eighth Circuit noted an NFL concern that expiration of the nonstatutory labor exemption at impasse would motivate the NFLPA to reach impasse so it could sue for treble damages under the antitrust laws. The NFL's concern supports this court's position that the nonstatutory exemption, and, necessarily, the terms of the collective bargaining agreement, should end at expiration of that agreement. Such an endpoint is rational given that the continued recognition of the terms and application of the exemption after expiration permits the NFL to commit antitrust violations where there is no actual union consent to exempt those otherwise unlawful restraints from application of the antitrust laws. Because union consent is a prerequisite for the exemption to apply, this court cannot find that the exemption can apply where union consent is absent.

The unions have every right to seek treble damages for unlawful NFL antitrust restraints. It is this court's view that the NFL's antitrust liability should attach at expiration of the collective bargaining agreement, not at some indeterminate point beyond expiration which is labelled "impasse." Antitrust exemption should end at expiration because the reason for the exemption no longer exists; the union no longer agrees to the restraint and therefore continuation of the restraint violates the Sherman Act. Moreover, extension beyond expiration of the collective bargaining agreement breeds uncertainty for the parties and the courts and also inhibits negotiation on a new collective bargaining agreement. If the terms and the nonstatutory exemption don't end at expiration, parties don't have deadlines after which they can be certain that antitrust liability properly applies. Without such certainty, no new agreement will be executed.

Without an endpoint at expiration, the terms of a collective bargaining agreement and the applicability of the nonstatutory labor exemption remain in perpetual limbo. Even if a court were to set expiration at impasse, this would not foster execution of a new collective bargaining agreement [5] or remove any uncertainty because courts would still have to determine the existence of "impasse" and whether court intervention at that point would be appropriate—determinations as to which different courts will likely differ.[6]

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[5] Ethan Lock, who has written in depth on the issue before the court, has noted that:

> simultaneous expiration of the agreement and the labor exemption undoubtedly would have had an impact on the parties' relative leverage in collective bargaining. At a minimum, such a result would have forced the parties to engage in meaningful negotiations at an earlier time and, in the absence of agreement, precipitated a quicker resolution of the merits of the pending lawsuit[s].

Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. 339, 400 [hereafter referred to as "Lock, *The Scope of the Labor Exemption*"].

[6] As will be discussed more fully below, the Supreme Court has described impasse as a recurring feature of collective bargaining which is often broken when either party brings various economic forces to bear in order to break the impasse. As such, when presented with an impasse claim, the NLRB or the courts would not only have to determine whether impasse occurred, but whether, if so, court or NLRB intervention at this point is premature given the parties respective economic forces which can help the parties break the impasse and resolve their own differences. Lock has noted that "Congress designed the procedural framework of the NLRA to ensure that employers and employee representatives will make an honest effort to resolve their differences at the bargaining table. Congress clearly intended the parties involved in a collective bargaining relationship to resolve their own disputes." Lock, *The Scope of the Labor Exemption* 1989 Duke L.J. at 382 (citations omitted).

One court has added a new level of uncertainty to application of the nonstatutory exemption beyond expiration by holding that an employer can impose a restraint after expiration only if the

Ending the nonstatutory exemption at expiration honors the overall policy goal of the labor laws which is to foster negotiated agreements between labor and employers. This policy is not being furthered by the law as it stands today. One court, jurisdictionally bound by *Powell v. National Football League*, 888 F.2d 559, which extended the nonstatutory labor exemption beyond impasse, recently held the nonstatutory exemption inapplicable to NFL action because the NFLPA had given up its role as the collective bargaining agent for NFL players. *Powell v. National Football League*, No. 4-87-917 (D.Minn. May 28, 1991). This court is not bound by the Eighth Circuit's holding in *Powell* and will not follow it. This court does not believe that this nation's labor policy, as discussed in this opinion, requires a union to give up its rights as the bargaining agent for employees in order to escape application of the terms of an expired collective bargaining agreement and reinstate the NFL's liability under the antitrust laws. Certainly such a measure does not promote the negotiation of collective bargaining agreements or labor peace. *See Powell v. National Football League*, 888 F.2d at 574 (Lay, Chief J., dissenting from denial of rehearing *en banc*) ("the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable"); *id.* at 570 (Heaney, J., dissenting) ("end result of majority opinion is that once a union agrees to a package of player restraints, it will be bound forever unless the union forfeits its bargaining rights").

Extending the nonstatutory labor exemption beyond expiration also deprives labor of an important bargaining

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employer "reasonably believes that the [restraint] or a close variant of it will be incorporated in the next collective bargaining agreement." *Bridgeman v. NBA*, 675 F. Supp. 960, 967 (D.N.J. 1987). Not only does this disregard the fact that the union has not agreed to the restraint, it requires courts to make the determination of whether the employer believed the restraint would be incorporated in a subsequent agreement, and whether such belief was "reasonable." Again, different courts, given the same facts, will reach different conclusions.

right and impinges on labor's freedom of contract. The threat of treble damages under the antitrust laws is one of union's economic weapons in its collective bargaining arsenal. Exempting employers from application of the antitrust laws in the absence of a collective bargaining agreement deprives unions of a statutorily created bargaining chip in the negotiating process. This chip may well be labor's strongest weapon insofar as labor has the power to subject employers to great economic risk under the antitrust and labor laws for activities which Congress has determined are unlawful restraints. This economic force is a lawful chip the union has to induce employers to reach agreement on collective bargaining terms so that the exemption would apply.

At the same time, extension of the nonstatutory labor exemption beyond expiration of the collective bargaining agreement is inconsistent with the primary policy behind the labor laws and the nonstatutory labor exemption. As discussed earlier, that goal is to promote the execution of new collective bargaining agreements. Under the nonstatutory labor exemption, employers are exempt from certain applications of the antitrust law. Such exemption is consistent with the policies behind labor laws and the exemption which together seek to encourage employers and unions to agree on terms relating to conditions of employment. Terms included within a collective bargaining agreement are protected. Extension of the exemption beyond expiration of that agreement frustrates the relevant policies because it treats the parties as if there is a collective bargaining agreement when in fact there is none. If the parties have not expressly agreed to terms relating to conditions of employment, this court can find no discernible justification for granting the employer any exemption from the antitrust laws. To do so would reward employers simply for being part of a collective bargaining relationship where employers and labor had at one time agreed on terms relating to conditions of employment.

This court agrees with Lock's conclusion that an "employer should be exposed to antitrust liability for continuing to enforce a provision that violates the Sherman Act if the union has ceased to consent to that provision. Such a provision is immunized *only* by the union's consent." Lock, *The Scope of the Labor Exemption,* 1989 Duke L.J. at 376. By failing to expressly continue the terms of an expired collective bargaining agreement, the union has ceased to consent to the terms therein. Neither does the NLRA nor should the courts "dictate the substantive terms of any bargain between the parties." *Id.* at 382 (citations omitted). On this subject, Lock has stated that an:

> employer should not be permitted to use the status quo doctrine to shield otherwise illegal provisions that the union no longer desires. The fact that the restraint was previously subject to good faith negotiations is relevant to an employer's obligation to maintain the status quo; previous good-faith negotiations are not relevant to the application or nonapplication of the labor exemption once the agreement has expired. Upon expiration of the agreement, an employer either should be forced to comply with the antitrust laws or willing to negotiate away benefits in return for the unreasonable restraint. The [NFL] owners' argument that such a result creates an unjustifiable shift in bargaining leverage is difficult to accept. The union *should* have leverage to modify or eliminate an illegal restraint it determines is no longer in its best interest.

Id. at 391. If the union does not have the power to eliminate a once agreed to restraint, "an agreement to a particular *unreasonable* restraint for a finite period operates to waive, indefinitely or permanently, a party's rights under the antitrust laws. In short, the players' rights under the antitrust laws lie, after the agreement has expired, in the hands of the owners." *Id.* at 393. This

court does not believe that a union, by signing a collective bargaining agreement, can be required to be governed by its terms, absent express approval, after that agreement has expired.

Extension of the nonstatutory exemption beyond expiration of the collective bargaining agreement also deprives unions of their right to bind themselves through a contract, for a limited duration only, to restraints that would otherwise be unlawful under the Sherman Act. Courts infringe on this right when they fashion an exemption for those restraints which shield employers indefinitely beyond expiration of the collective bargaining agreement. Through extension of the nonstatutory labor exemption beyond expiration, courts impose indefinite restraints on unions which the unions only agreed to for periods of time indicated in the collective bargaining agreement. In his article, Lock noted that the right to contract is

> one of the most fundamental rights established under the NLRA [and that it enables] the parties . . . to establish through good faith negotiations the terms of their own agreement. This right necessarily incorporates the freedom of contract. In fact, freedom of contract is so fundamental that the parties may agree in certain instances on unreasonable restraints of trade. The freedom to contract also enables the parties to determine the length of their agreement.

Id. at 394 (citations omitted). Through the nonstatutory labor exemption, courts actually deprive labor of their right to contract as to an integral contract term: duration.

Ending the nonstatutory labor exemption and the terms of a collective bargaining agreement at expiration of the agreement provides a bright line for the parties to take into the bargaining room and for the NLRB and courts to rule from when presented with exemption disputes. Such a bright line would extricate courts from the morass the current state of the law has produced and is consistent

with the policies embodied in the labor and antitrust laws as well as the judicially created nonstatutory labor exemption.[7]

C. *Nonstatutory Labor Exemption Does Not Extend Beyond Impasse.*

Alternatively, the NFL's action is not shielded from antitrust liability in the present case because, even assuming that the nonstatutory labor exemption extends beyond expiration of the collective bargaining agreement and that the parties bargained in good faith to impasse, this court holds that the nonstatutory labor exemption does not extend antitrust liability protection beyond impasse after a collecive bargaining agreement has expired.

Under the three part test established by the Eighth Circuit in *Mackey v. NFL,* 543 F.2d 606, the nonstatutory labor exemption is implicated in the present case. In *Mackey,* the Eighth Circuit established a three part test to determine whether the nonstatuory labor exemption should apply:

> First, labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. . . . Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. . . . Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

Id. at 614 (citations omitted).

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[7] This court believes that the decision to extend any labor exemption beyond expiration of collective bargaining agreements is an issue properly left to Congress to resolve.

The present case satisfies all three prongs. First, the developmental squad salary restraint primarily affected only the parties to the collective bargaining relationship: the NFL employers and prospective NFL employees. Second, the salary terms at issue in this lawsuit are mandatory subjects of collective bargaining. 29 U.S.C. § 158 (d); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Third, assuming, for purposes of this part of the court's opinion, that the salary provisions in the present dispute were encompassed in the expired collective bargaining agreement, the parties did bargain at arm's length and in good faith to impasse. The parties met face-to-face on one occasion, had several telephone conversations, and exchanged correspondence delineating their respective positions on numerous occasions between March 22, 1989, when the NFL adopted Resolution G-2, and September 5, 1989, the effective date of developmental squad formation. The positions of both the NFL and NFLPA were clear; the NFL wanted a fixed salary for all developmental squad players; the NFLPA would not accept any terms which did not afford developmental squad players the right to negotiate their own salaries.

The fact that neither the NFL nor the NFLPA changed their respective positions regarding the developmental squad salary terms during the five month period does not suggest the absence of good faith bargaining. During collective bargaining, no party is required to agree to a proposal or to make a concession. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970).

The fact that neither party relented from its original bargaining position supports the conclusion that the NFL and NFLPA had negotiated to "impasse." The Supreme Court has accepted the following definition of impasse: "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless . . . ." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484

U.S. at 543 n.5 (citations omitted). The Supreme Court has also noted that impasse is "only a temporary deadlock or hiatus in negotiations" and "a recurring feature in the bargaining process . . . which in almost all cases is eventually broken, through either a change of mind or the application of economic force." *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982) (citations and quotation marks omitted). The "economic force" which parties can apply includes strikes, lockouts, pickets, and the hiring of replacement workers. *See e.g.* 29 U.S.C. § 104 (listing some permissible union activities during labor disputes which cannot be subjected to restraining order or injunctions).

At impasse, the NFL implemented the developmental squad concept, including the fixed salary provisions. Because this court finds that the nonstatutory labor exemption to the antitrust laws does not extend beyond impasse, the NFL may be held liable for imposing the developmental squad salary restraint. This court understands the policy behind extending antitrust protection for restraints contained in a collective bargaining agreement beyond expiration. In theory, the purpose of such extension is to facilitate negotiation of a new collective bargaining agreement: "[f]reezing the status quo ante after a collective bargaining agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 544. *See NLRB v. Cauthorne*, 691 F.2d at 1025 (expired collective bargaining agreement defines, and employer must maintain, status quo as to wages and working conditions until parties negotiate new agreement).

To extend nonstatutory labor exemption protection to unilateral changes in the terms of an expired collective bargaining agreement after impasse does not facilitate negotiation of a new collective bargaining agreement.

Such extension actually hinders such negotiation by forcing unions to accept terms concerning mandatory subjects of collective bargaining to which they never agreed simply because one party claimed impasse.[8]

Extending the nonstatutory labor exemption beyond expiration of the collective bargaining agreement burdens the negotiating process by forcing the parties to appeal to the NLRB or courts for resolution of such issues as whether the parties bargained in good faith after expiration and whether the parties in fact reached impasse. The adjudicating body must also determine whether this impasse may be broken by the parties' use of economic force, thereby making intervention premature. Given that the Supreme Court has characterized impasse as a recurring feature in negotiations, the suitability of extending the antitrust exemption to or beyond impasse becomes problematic. Such extension certainly encourages employers to feign or force impasse so as to justify unilateral imposition of restraints which may once have been but

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[8] While such extension can be justified by virtue of the fact that the union assented to the restraint at one point (when it executed the collective bargaining agreement), this assent, one might argue, can justifiably be regarded as continuing so long as there is no post-expiration objection to the restraint. This court believes that a better rule of law requires the parties to expressly agree to extend the terms in the collective bargaining agreement after expiration in order for the nonstatutory labor exemption to continue to shield the restraints from antitrust liability. Such a rule would obviate the fiction of assumed continued assent until impasse and would remove the issue of the applicability of the nonstatutory labor exemption from the indefinite twilight zone it is now in. Courts should not hold unions and employers to indefinite fictional contracts by treating the parties as if a collective bargaining agreement exists when in fact none exists. Furthermore, there is little incentive for the parties to execute a new collective bargaining agreement when the parties know that courts will continue indefinitely to honor the terms of an expired collective bargaining agreement without the parties even having to expressly agree to extend application of the terms in that agreement.

are no longer acceptable to the union. In addition, given that the definition of impasse acknowledges that it is a "recurring feature in the bargaining process" which is eventually broken in "almost all cases" by the application of economic force, *Bonanno Linen Service v. NLRB*, 454 U.S. at 412, permitting implementation of pre-impasse proposals which are then protected from antitrust liability by the nonstatutory labor exemption appears premature because it enables employers to obtain their objectives without having to make any compromises or resort to the economic forces which are part of the collective bargaining process.

Assuming only for purposes of this part of the court's opinion that the nonstatutory labor exemption extends beyond expiration of a collective bargaining agreement this court holds that the nonstatutory labor exemption ends at impasse because the fact that the parties have reached impasse shows that they no longer agree on terms involving mandatory subjects of collective bargaining. At impasse, at the latest, the policies behind providing the nonstatutory labor exemption are no longer furthered by continued application of that exemption. If the purpose of providing the nonstatutory labor exemption is to promote reaching new collective bargaining agreements by shielding restraints imposed within the context of collective bargaining agreements, it is inconsistent with that purpose to extend that exemption to restraints to which the union no longer agrees, even if the union had at one time agreed to the restraint and it was in a collective bargaining agreement. It seems that the only justification for such an extension would be that the restraint resulted from the fact that there was a collective bargaining *relationship* and that the parties had negotiated to some extent. Such an extension would actually discourage collective bargaining agreements because it would encourage employers to reach impasse since they could then implement restraints which the union found unacceptable without having to make any bargaining concessions. Employ-

ers would then be immune from antitrust liability for those restraints. This court does not believe that such an extension was contemplated in the national labor policy.

Allowing unilateral imposition of restraints at impasse would also short circuit the collective bargaining process as established by statute. As a means of overcoming impasse, unions and employers have various economic forces at their disposal. For example, various statutes exempt certain union activities, such as strikes, pickets, and boycotts, from the antitrust laws. *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. at 621-22. The NFL has its own economic forces, such as lockouts and hiring replacement players if the players strike. *See Charles D. Bonanno Linen Service Inc. v. NLRB,* 454 U.S. at 415-16 n.9 (discussing economic forces of employers). In addition, both the NFL and NFLPA have the right to withhold consent or concessions on other bargaining provisions in order to force compromise or capitulation on a given issue during bargaining. In the context of this case, immunity from the antitrust laws for implementation at impasse of provisions which were not part of the expired collective bargaining agreement frustrates the normal operation of the collective bargaining process and gives employers an unfair advantage over unions by enabling employers to implement, without risk of antitrust liability, restraints to which the union has never agreed or no longer agrees. If permitted to implement pre-impasse proposals without risk of antitrust liability in order to obtain their objectives without having to make any concessions which would lead to the execution of a collective bargaining agreement, employers would have no incentive to negotiate collective bargaining agreements. Similarly, such extension would discourage unions from entering collective bargaining agreements because they would not want to be held indeterminately to restraints which they may only be willing to accept for a set amount of time as set forth in the agreement. Moreover, extending the exemption

beyond impasse deprives labor of one of its rightful bargaining forces: the threat of antitrust sanctions. For these reasons, this court will not extend the antitrust shield of the nonstatutory labor exemption beyond impasse.[9]

D. *Nonstatutory Labor Exemption Does Not Apply.*

As an additional alternative holding, this court finds that the nonstatutory labor exemption does not shield the NFL from antitrust liability for the salary provisions implemented here because those salary provisions were never encompassed in the expired collective bargaining agreement. Because the developmental squad was novel, and because the NFL implemented new salary provisions which were not part of the expired collective bargaining agreement, the nonstatutory labor exemption does not shield the NFL's implementation of the developmental squad salary provisions from antitrust liability. The case law cited above establishes that the nonstatutory labor exemption protects employers from antitrust liability for restraints contained in a collective bargaining agreement. This court does not read the nonstatutory labor exemption to extend antitrust protection to restraints that are not part of an existing, much less expired, collective bargaining agreement.

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[9] This court's finding that the nonstatutory labor exemption does not extend beyond impasse is consistent with Supreme Court precedent. The Supreme Court and this Circuit have acknowledged that employers do not violate the labor laws by unilaterally changing employment terms after impasse as long as these changes have been offered as good faith proposals in bargaining. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 483-84 n.5; *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. at 415-16 n.9; *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d at 1113; *NLRB v. Cauthorne*, 691 F.2d at 1025 (same); *but see Powell v. NFL*, 888 F.2d at 568 (nonstatutory labor exemption extends beyond impasse). However, those rulings do not stand for the proposition that such unilateral changes or restraints are exempt from the antitrust laws.

Courts cannot compel a party to accept contract terms to which that party has never agreed. In the labor field, the Supreme Court has found that, while the NLRB has the power to require employers and unions to negotiate, it does *not* have the power to compel either to agree to any substantive contractual provision of a collective bargaining agreement. *H.K. Porter Co. v. NLRB*, 397 U.S. at 103-104 & 109. The provision of the NLRA which relates to the obligation to bargain collectively expressly states that this obligation "does not compel either party to agree to a proposal or require the making of a concession . . . ." *Id.* at 106, citing 29 U.S.C. § 158(d) (1973 & Supp. 1991). Given that the Supreme Court has acknowledged that the law does not permit the NLRB to force a party to agree to a substantive contract provision, this court finds no rationale which would justify this court's imposing the developmental squad salary terms on the NFLPA because the NFLPA never agreed to that provision in the 1982 Collective Bargaining Agreement. Indeed, at the time that agreement was executed, the developmental squad concept had never been raised by either party.

While they do relate to wages, a mandatory subject of collective bargaining, the developmental squad salary provisions were never part of a collective bargaining agreement to which the NFLPA agreed. *See* Defendants' Motion for Summary Judgment, Statement of Material Facts Not in Genuine Dispute at ¶ 7 (defendants admit that "1982 bargaining agreement contained no provisions with respect to developmental squads . . . ."). The law regarding the nonstatutory labor exemption applies that exemption only to changes in terms relating to mandatory subjects of collective bargaining in a collective bargaining agreement. *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 544 n.6 ("any unilateral change by the employer in the pension fund *arrangements provided by an expired agreement* is an unfair labor practice") (emphasis

added); *Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965) ("[e]mployers and unions are required to bargain about wages, hours, and working conditions, and this fact weighs heavily in favor of antitrust exemption for *agreement* on these subjects") (emphasis added); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d at 1113 ("provisions of [an] expired collective-bargaining *agreement* that relate to mandatory subjects are said to survive the agreement's expiration") (emphasis added); *NLRB v. Cauthorne*, 691 F.2d at 1025 (addressing employer's pre-impasse "unilateral change in *established* wages or working conditions") (emphasis added); *Mackey v. National Football League*, 543 F.2d at 612-13 (nonstatutory labor exemption applied to "Rozelle Rule" because it was encompassed by *prior collective bargaining agreements*) (emphasis added); *see* Lock, *The Scope of the Labor Exemption*, 1989 Duke L.J. at 352 n.85 ("union approval seems to be a prerequisite to the application of the exemption").

The present case does not involve any change in preexisting wage terms of either an active or expired collective bargaining agreement. In fact, creation of the developmental squads added a novel category of players to each NFL club. These players were not treated under the salary terms applicable to regular NFL players. Under the 1982 Collective Bargaining Agreement, the NFL players were expressly given the right to negotiate the salary terms of their contracts. 1982 Collective Bargaining Agreement at Article XXII, Plaintiffs' Exhibits at 1. By contrast, the developmental squad contracts indicates that the prospective developmental squad players had no right to negotiate their own salary terms but instead were to receive a fixed non-negotiable salary of $1,000 per week. Plaintiffs' Exhibits at 8, 9, 15 & 28. Moreover, the salary provision applicable to regular NFL players, as established in the expired collective bargain-

ing agreement, were not effected in any manner by implementation of the developmental squad salary provisions.[10]

Because the developmental squad salary provisions were a new concept and not a change in terms of the expired collective bargaining agreement, the policy behind continuing the nonstatutory labor exemption for the terms of a collective bargaining agreement after expiration (to foster an atmosphere conducive to the negotiation of a new collective bargaining agreement) does not apply. To hold that the nonstatutory labor exemption extends to shield the NFL from antitrust liability for imposing restraints never before agreed to by the union would not only infringe on the union's freedom to contract, *H.K. Porter Co. v. NLRB*, 397 U.S. at 108 (one of fundamental policies of NLRA is freedom of contract),[11] but would also contradict the very purpose of the antitrust exemption by not promoting execution of a collective bargaining agreement with terms mutually acceptable to employer and labor union alike. Labor

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[10] The fact that the principal issue in this case involves salary provisions, a mandatory subject of collective bargaining, does not trigger protection of the nonstatutory labor exemption simply by virtue of the fact that the expired collective bargaining agreement had salary provisions. That common thread is not enough. As discussed above, the developmental squad salary provision involved a wholly new concept involving the creation of a new category of football player which was never negotiated by the NFL and NFLPA and had never been included in the expired collective bargaining agreement. The NFL acknowledged as much when it proposed a modification of the expired 1982 Collective Bargaining Agreement, not to change the salary provision but to make it inapplicable to developmental squad players who would be covered by a "special services contract" of $1,000 per week. Plaintiffs' Exhibits at 9.

[11] The Supreme Court also noted that allowing an adjudicator to "compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the [NLRA] is based—private bargaining under governmental supervision of procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. at 108.

unions would be unlikely to sign collective bargaining agreements with employers if they believed that they would be forced to accept terms to which they never agreed.

Finding that the salary restraint at issue in this case was never included in a collective bargaining agreement, this court holds that the nonstatutory labor exemption does not shield the NFL's action from antitrust liability. *See Mackey v. NFL*, 543 F.2d 606, 615-16 (8th Cir. 1976) (restraint at issue does not qualify for exemption from antitrust laws because restraint had never been bargained for with NFLPA and because NFL unilaterally incorporated restraint into collective bargaining agreements).

IV. CONCLUSION

For the reasons stated in this opinion, defendants' motion for summary judgment will be denied. Partial summary judgment will be granted for plaintiffs as to defendants' nonstatutory labor exemption defense. Defendants will not be permitted to raise the nonstatutory labor exemption as a defense to plaintiffs' antitrust claims in this case.

A separate order shall issue consistent with this opinion.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: Jun. 4, 1991

[Filed June 4, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1071
(RCL)

ANTONY BROWN, *et al.*,
Plaintiffs,

v.

PRO FOOTBALL, INC., d/b/a
WASHINGTON REDSKINS, *et al.*,
Defendants.

ORDER

(Striking Nonstatutory Labor Exemption Defense)

This case comes before the court on plaintiffs' motion to strike defendants' nonstatutory labor exemption defense or for partial summary judgment, defendants' motion for summary judgment as to the nonstatutory labor exemption, and the parties' respective oppositions and replies. After consideration of all the arguments and authorities presented by both parties in their filings and at oral argument, and for the reasons stated in the accompanying Memorandum Opinion issued this date, it is hereby

ORDERED that:

1. Defendants' motion for summary judgment on the nonstatutory labor exemption defense is DENIED.

2. Plaintiffs' motion for partial summary judgment on the nonstatutory labor exemption defense is GRANTED and defendants' nonstatutory labor exemption defense is STRICKEN.

3. Defendants shall file an opposition to plaintiffs' Motion for Summary Judgment on Liability (filed December 17, 1990), by July 5, 1991.

4. Plaintiffs shall file a reply to defendants' opposition by July 15, 1991.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: Jun. 4, 1991

APPENDIX D

[Filed Mar. 10, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1071
(RCL)

ANTONY BROWN, *et al.*,
Plaintiffs

v.

PRO FOOTBALL, INC., d/b/a
WASHINGTON REDSKINS, *et al.*,
Defendants.

MEMORANDUM OPINION

This case comes before the court on Plaintiffs' Motion for Summary Judgment On Liability,[1] the NFL Defendants' Brief In Opposition To Plaintiffs' Motion For Summary Judgment On Liability ("NFL's Opposition"), and plaintiffs' Reply Memorandum In Support Of Plaintiffs' Motion For Summary Judgment On Liability ("Plaintiffs' Reply"). Upon consideration of the oral arguments of counsel, the authorities presented in their memoranda, and the record herein, the court will grant plaintiffs' motion for summary judgment on liability.

I. *FACTS*

Plaintiffs in this action are professional football players who played on Developmental Squads of the twenty-eight

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[1] Plaintiffs submitted a Memorandum In Support of Plaintiffs' Motion For Summary Judgment On Liability ("Plaintiffs' Memorandum"), as well as two volumes which contain statements of material facts and exhibits: Plaintiffs' Statement Of Material Facts Not In Genuine Dispute And Supporting Exhibits; and Plaintiffs' Supplemental Statement Of Material Facts Not In Genuine Dispute And Supplemental Exhibits, Volume II. When necessary to refer to either volume, the court will cite to "Plaintiffs' Exhibits, Volume I," or to "Plaintiffs' Exhibits, Volume II."

National Football League ("NFL") teams during the 1989 regular and post-seasons. By court order, plaintiffs have been certified as a class for purposes of the present case.[2] Defendants are the individual twenty-eight clubs which comprise the NFL, as well as the NFL itself.

On February 23, 1989, the NFL's Long Range Planning/Finance Committee discussed the framework for establishing Developmental Squads of up to six players for each of the NFL teams. Plaintiffs' Exhibits, Volume I, at 4. The Developmental Squads were a new concept which, under the terms of 1989 Resolution G-2 ("Resolution G-2"), would permit each NFL club to sign rookie and first year free agents to services contracts for the 1989 NFL season.[3] At its annual meeting on March 22, 1989, the NFL, *inter alia*, voted to adopt Resolution G-2 and to amend the NFL Constitution and Bylaws accordingly. Under the terms of Resolution G-2, the NFL clubs would be able to sign Developmental Squad players beginning on September 5, 1989. *Id.* at Exhibit 5.

The present case and the motion currently before the court involve the compensation terms of Resolution G-2, which provided that Developmental Squad players would be paid a fixed salary of $1,000 per week, instead of being permitted to negotiate their own salaries. On September 5, 1989, the day the NFL clubs began signing developmental players, then-NFL Commissioner Pete Rozelle circulated a memorandum to all NFL teams remind-

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[2] Named plaintiffs include Antony Brown, James Bishop, John Buddenberg, Gary Couch, Craig Davis, Matthew J. Jaworski, Ricky Andrews, and Wesley Pritchert.

[3] Resolution G-2 defined the two classes of players as follows:

> A "Rookie" is defined as a player who has not previously been under contract to a professional football team. Players who have been active in another professional football league or whose NFL experience is limited to training camp or fewer than three games on an Active List during the regular season or postseason are "first-year players."

Plaintiffs' Exhibits, Volme I, at Exhibit 5.

ing them that "weekly compensation to be paid to Developmental Squad Players is $1,000. Individually negotiated terms above or below $1,000 are not permitted." *Id.* at Exhibit 28. The memorandum indicated that other forms of compensation, such as per diem or housing arrangements, were impermissible. *Id.* On October 17, 1989, Eugene Upshaw, representative of the NFL Players Association ("NFLPA"), sent Jack M. Donlan, Executive Director of the NFL Management Council, a letter stating the NFLPA view that the Developmental Squad salary provision "violates the law." *Id.* at Exhibit 35. Plaintiffs, through the NFLPA, filed the present suit on May 9, 1990.

During each week of the 1988 and 1989 regular and post-seasons, each NFL club was permitted to carry on its roster a maximum of forty-five active and two inactive players. Plaintiffs' Exhibits, Volume II, at 2, ¶ 37.[4] Each club, carried the maximum number of forty-seven players on their Active/Inactive lists during virtually every week of both seasons. *Id.* Only players on the active list were permitted to suit up and play during each week. *Id.* ¶ 38. Inactive players were permitted to practice with their clubs. *Id.* ¶ 39. During the 1988 and 1989 regular and post-seasons, the NFL Constitution and Bylaws provided that "[p]layers on Reserve/Injured are compensated at the full rate of their NFL Players Contracts . . . ." *Id.* ¶ 40.

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[4] The facts set forth from this point on in Part I of this Memorandum Opinion are taken from Plaintiffs' Supplemental Statement Of Material Facts Not In Genuine Dispute, located in Plaintiffs' Exhibits Volume II, and Defendants' Response To Plaintiffs' Supplemental Statement Of Material Facts Not In Genuine Dispute. Both plaintiffs' and defendants' supplemental statements include citations to supporting documents. Since defendants did not file a Statement of Genuine Issues, as required by Local Rule 108(h), plaintiffs properly pointed out at oral argument that the court could, and it hereby does, accept as true all of plaintiffs' Statements of Material Facts. *See Twist v. Meese*, 854 F.2d 1421 (D.C. Cir. 1988).

In 1988, the NFL Constitution and Bylaws contained the following language concerning reserve/injured players participating in practices and other team functions:

> PARTICIPATION WHILE ON RESERVE/INJURED. Players on Reserve/Injured may attend team meetings and participate in practice sessions with Active List players as soon as physically able to do so. Players on Reserve/Injured are prohibited from appearing in games, participating in game-day warm-ups with their teams, dressing in game uniforms on game-days, or representing their teams in pre-game ceremonies. Reserve/Injured players may, however, serve their clubs on the sidelines, provided they perform a necessary function connected with the game, dress in clothing issued by the club to its game staff, and display appropriate credentials under the prevailing rules covering the bench areas.
>
> . . .
>
> 4. Throughout the entire four-week period specified in Nos. 2 and 3 above [concerning players with major pre-season injuries], the involved player must not engage in regular practice. He will be limited to rehabilitation workouts apart from Active List players. The club would be required to notify the League office by TWX as soon as the player resumes regular practice, in which case the four-week "clock" would stop, and the club would have no right to place the player onto Reserve/Injured with a major injury. Of course, if a subsequent injury occurred, the procedures could be repeated.
>
> 5. Despite the prohibition of practice during the four-week period under No. 4 above, if, in the preseason or regular season, a player goes onto Reserve/Injured under normal circumstances and his injury is documented as four weeks or more from the date of going onto Reserve, then such player may resume practice sessions with Ac-

> tive List players as soon as physically able to do so; provided, however, that the Commissioner may, if he deems the content and date of the resumed practice to be inconsistent with the purported nature and severity of the player's injury, take such factors into account in his investigation of the case.

Id. at 2-3, ¶ 41.

The following members of the plaintiff class were on reserve/injured status during the *1988* NFL season and were paid by their respective clubs the weekly salaries set forth below: [5]

Class Members' Name	1988 Club	1988 Weekly Salary
a. Birden, J.J.	Clev. Browns	($3,750)
b. Brown, Henry	Buffalo Bills	($4,250)
c. Brown, Tony	N.Y. Giants	($4,688)
d. Carter, Jon	N.Y. Giants	($4,688)
e. Crudup, Derrick	L.A. Raiders	($4,375)
f. Cullity, Dave	Clev. Browns	($5,312)
g. Derby, Glenn	N.O. Saints	($2,500)
h. Ford, Bernard	Buffalo Bills	($6,250)
i. Henley, Thomas	L.A. Rams	($2,812)
j. Henry, Charles	L.A. Raiders	($2,500)
k. Murray, Dan	Buffalo Bills	($3,125)
l. Patchan, Matt	Phil. Eagles	($6,875)
m. Roach, Kirk	Buffalo Bills	($3,125)
n. Sterling, Rod	Phil. Eagles	($4,187)
o. Stewart, Curtis	Chicago Bears	($2,187)
p. Usher, Daryl	N.E. Patriots	($2,812)
q. VanDruten, R.	K.C. Chiefs	($2,812)
r. Ware, Reggie	L.A. Raiders	($2,375)
s. Whitaker, D.	N.Y. Giants	($4,250)
t. Williams, R.	S.D. Chargers	($2,187)

Id. at 4, ¶ 43.

[5] Defendants do not dispute this paragraph, except for the alleged "inaccurate juxtaposition of player names and team names." Defendants' Response To Plaintiffs' Supplemental Statement Of Material Facts Not In Genuine Dispute at ¶ 43. Because neither party corrected any alleged "inaccurate juxtaposition" and because defendants do not dispute the paragraph, the court has reproduced it as presented by plaintiffs.

In recommending adoption of Resolution G-2, the NFL's Combined Finance/Long Range Planning Committee acknowledged a "fiscal" reason: "[t]o promote competitive equality under fiscally responsible circumstances while maintaining many elements of the personnel system currently in place." *Id.* at ¶ 44. As adopted as an amendment to the NFL Constitution, Resolution G-2 provided that certain players placed on reserve/injured status could not practice and that others could, but would count against each Club's limit of six Developmental Squad players:

a. A player placed on Reserve/Injured prior to or concurrent with the final roster reduction may not return to his club's Active List in that season under any circumstances. Clubs may request waivers on such players at any time or retain them on their Reserve/Injured List for the rest of the season. Such players may not practice.

b. Players placed on Reserve/Injured after the final roster reduction will be eligible to return to the club's Active List after a minimum of six games, either by free activation or by procedural recall waivers. Clubs will be permitted five free activations during the regular season.

   For such players, clubs will have two options: option one is to begin practice after a minimum of four weeks, and option two is to begin practice after a minimum of six weeks on Reserve/Injured.

   Option One: If a player begins practice after a minimum of four weeks, the club is permitted to practice the player for a maximum of two weeks, after which it must either return him to the Active List or request waivers, unless he has been injured; if injured, the player may be retained on Reserve/Injured, but he will not be eligible to practice or to be activated thereafter.

> *Option Two* If a player begins practice after a minimum of six weeks on Reserve/Injured, the player is eligible to practice for the rest of the season, but he counts against the club's Developmental Squal limit of six players.

Id. at 4-5, ¶ 45.

The NFL's internal analysis showed that sixty-seven drafted players in 1989 had signed Developmental Squad contracts, a number precisely equal to the number of drafted players in 1988 who had been placed on reserve/injured status as of the first regular season game of each season. *Id.* at 6-7, ¶ 47. A question and answer sheet prepared by the NFL confirmed that reserve/injured players cleared to practice would be counted against the maximum number of six Developmental Squad players that each club could carry. *Id.* at 7, ¶ 49. During the 1989 season, the NFL issued a Player-Personnel directive to all NFL clubs concerning the game day activities of Developmental Squad players and other players not on a club's Active List. This document directed that all such players be treated similarly:

> Clubs are reminded that, according to League policy, players on Reserve/Injured, the Inactive List, and the Developmental Squad are prohibited from participating in game-day warmups with their teams, dressing in game uniforms on game-days, or representing their teams in pregame ceremonies. They may, however, serve their clubs on the sidelines *provided they perform a necessary function connected with the game, dress in clothing issued by the Club to its game staff, and display appropriate bench area credentials.*

Id. at 8, ¶ 51.

A number of the members in plaintiffs' class obtained employment as NFL players of one sort or another in

1990. As of October 1, 1990, the date of the computer generated "Player Profiles" produced in discovery, fifty-four members were listed by the NFL as Active, and twenty-six were listed on Reserve/Injured or Reserve/Physically Unable to Performs. Other class members had been signed to 1990 Practice Player Contracts.[6] *Id.* at 9, ¶ 55.

II *LAW*

Plaintiffs claim that the uniform wage provision in Resolution G-2 violates the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 (1973 & Supp. 1991), and move for summary judgment on the NFL's and the NFL clubs' liability for the antitrust violation. The relevant section of the Sherman Act provides: "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (1973 & Supp. 1991). Plaintiffs also claim that defendants' unlawful salary restraint caused injury to their business or property for which they are entitled to treble damages and attorney's fees under section 4 of the Clayton Act.[7] Rule 56(c) of the Federal Rules of Civil Procedure establishes that summary judgment is appropriate when an examination of the record as a whole reveals "no genuine issue as to any material fact and that the moving party is entitled to judgment as

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[6] For the 1990 regular and post-seasons, the NFL replaced the Developmental Squads with Practice Squads. The parties to this action, through counsel, negotiated an agreement concerning the practice squads called the "Partial Settlement Agreement For 1990." A similar agreement was negotiated for the 1991 season and approved by the court on September 13, 1991.

[7] Section four provides, in relevant part:

> . . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (1973 & Supp. 1991).

a matter of law." In examining the record, the court must view all inferences in the light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).[8]

III. *ANALYSIS*

Plaintiffs' motion requires the court to consider (1) whether the legality of the salary provision in Resolution G-2 is governed by the *per se* rule or the rule of reason; and (2) whether, under the applicable analysis, the undisputed facts establish that the Resolution G-2 salary provision is an antitrust violation.

A. *Applicability of Antitrust Laws to Salary Restraint*

Defendants claim that the antitrust laws have no application to alleged restraints, such as the one in this case, which affect only the labor market. NFL's Opposition at 54 n.42. Defendants' argument boils down to an assertion that the antitrust laws do not apply to wage-fixing restraints imposed by employer groups on employees. To support this claim, defendants cite the first sentence of

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[8] Defendants' suggestion that the summary judgment standard in this case is "unusually demanding" because plaintiffs would carry the burden of proof on their claims at trial, NFL's Opposition at 21-22, is misleading. In support of their position, defendants cite a provision in *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986), which states: "where the moving party has the burden . . . his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." This provision merely restates the standard established by the Supreme Court. The Supreme Court established the trial court's function on a motion for summary judgment as follows: "at the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Defendants have failed to establish that the summary judgment standard in *Calderone* is any different than the standard articulated by the Supreme Court.

Section 6 of the Clayton Act, which states: "[t]he labor of a human being is not a commodity or article of commerce." Clayton Act § 6, 15 U.S.C. § 17 (1982). By selectively reading only the first sentence, defendants misapprehend Section 6 of the Clayton Act. In full, Section 6 of the Clayton Act states:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Contrary to defendants' assertion, wage-fixing restraints which affect the labor market are considered price-fixing restraints subject to the antitrust laws. Section 6 of the Clayton Act does not exempt such restraints from antitrust liability:

> It is readily apparent that Congress, in enacting § 6, was concerned with the right of labor and similar organizations to continue engaging in [activities which otherwise would be considered antitrust violations], including the right to strike, not with the right of employers to band together for joint action in fixing the wages to be paid by each employer. There is no evidence of the existence of any necessity to protect the latter type of activity at the time when § 6 was enacted. It seems clear that if Congress had wanted to exempt agreements between employers as to the money or compensation that would be paid to their employees, it would not have limited § 6 to exemption of "[t]he labor of a human being" which can be

> restrained only by the employees or unions controlling the labor itself. Congress would also have provided that compensation offered or paid by employers to employees is not a commodity or article of commerce. This it did not do.

Cordova v. Bache & Co., 321 F. Supp. 600, 606 (S.D.N.Y. 1970) (Judge Mansfield). The principle that wage-fixing restraints are price-fixing restraints cognizable under the Sherman Act has been accepted by several courts. *See Mackey v. National Football League*, 543 F.2d 606, 617 n.22 (8th Cir. 1976) (quoting Judge Mansfield's *Cordova* passage in full); *International Ass'n of Heat and Frost Insulators v. United Contractors Assoc.*, 483 F.2d 384, 393 (3d Cir. 1973) (citing *Cordova* for proposition that § 6 of Clayton Act prohibits employers from banding together to fix wages); *Jacobi v. Bache & Co.*, 377 F. Supp. 86, 95 (S.D.N.Y. 1974) (agreeing in principle that wage-fixing is price-fixing). Moreover, the Supreme Court has noted that price fixing by purchasers of goods "is the sort of combination condemned by the [Sherman] Act." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). The court finds no discernible reason, given that the Sherman Act applies to services as well as goods, *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 490 (1950) (Sherman Act "aimed at combinations organized and directed to control of the market by suppression of competition 'in the marketing of goods and services' ") (citation omitted), why wage-fixing by purchasers of services should be treated differently than price-fixing by sellers of goods.

Other precedent lends further support to the application of the Sherman Act to wage-fixing restraints. The Supreme Court has noted the "broad remedial and deterrent objectives" of the Clayton Act and has recognized that the statute "does not confine its protection to consumers, or to purchasers, or to sellers . . . . The Act is

comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (quotation marks and citation omitted). The Supreme Court has clearly stated that the exchange of a "service for money is 'commerce' in the most common usage of that word" and that the Sherman Act applies to restraints involving the sale of services. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975).

Furthermore, the Supreme Court has noted that a consumer is injured in his or her business or property when the price of "goods or services is artificially inflated by reason of the anticompetitive conduct complained of." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). By analogy, and applying the broad remedial and deterrent objectives of the Clayton Act, a service provider is injured in his business or property when buyers of those services artificially deflate the price of services through cooperative anticompetitive conduct. *See Chattanooga Foundry & Pipe Workers v. Atlanta*, 203 U.S. 390, 396 (1960) (recognizing that a city can be injured in its "business of furnishing water" by an antitrust violation). The law in the District of Columbia Circuit recognizes "that athletes have standing to challenge player restrictions in professional sports since the restraints operate directly on, and to the detriment of, the employee." *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 n.2 (D.C. Cir. 1978).[9] Based on the authority cited above, this court finds that wage-fixing is an antitrust violation to which the Sherman Act applies.

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[9] Defendants do not contest that the alleged restraint affects interstate commerce.

B. *Sherman Act Liability*

1. *Per Se* Rule

Plaintiffs claim that defendants' agreement in Resolution G-2 to pay all Developmental Squad players a flat sum of $1,000 per week, regardless of any individual player's background, skill, or potential, is a *per se* violation of the Sherman Act. Plaintiffs' Memorandum at 17. Plaintiffs insist that the *per se* rule, rather than the rule of reason, applies because the challenged price-fixing restraint "is so thoroughly without redeeming virtue and had such an immediate and direct impact on competition for the services of these players, that it must be conclusively presumed to be unreasonable without any elaborate inquiry into the business excuse for its use." *Id.* at 18. Defendants counter that the *per se* rule does not apply to agreements among participants in joint enterprises in which the participants are not independent competitors. Defendants also claim that because the NFL teams are part of a joint venture, the court must undertake a rule of reason analysis and that genuine issues of material fact exist which preclude entry of summary judgment. NFL's Opposition at 23 & 40.[10] The court will address each argument in turn.

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[10] Defendants also claim that the *per se* rule does not apply because the price-fixing restraint was ancillary to the otherwise lawful G-2 Resolution. The court disagrees. While there may have been several purposes to the G-2 Resolution, the fixed salary provision was certainly central to that agreement. *See* Plaintiffs' Exhibits, Vol. II at ¶ 44 (reason to adopt Resolution G-2 was "[t]o promote competitive equality under fiscally responsible circumstances"). In fact, defendants acknowledge that without the fixed salary provision, Resolution G-2 would not have been adopted by the clubs. *See* NFL's Opposition at 44 (citing Declaration of Joel Bussert, Director of Player Personnel for NFL) ("but for the uniform salary there would have been no Developmental Squad program at all"). Given defendants' own admissions, the court rejects defendants' claim that the salary restraint was ancillary.

The Sherman Act prohibits combinations formed for the purpose of "raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce . . . ." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 346 (1982) (citing *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1951)). The Supreme Court explained:

> [a] conclusion that a restraint of trade is unreasonable may be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103 (1984) ("*NCAA*") (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690 (1978)). The Supreme Court has held that agreements to fix prices are unlawful *per se*, without regard to whether the prices fixed are reasonable. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). Supporting its view that price fixing agreements are unlawful *per se*, the Court noted that the "anti-competitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that [the Supreme Court] adhere[s] to the rule of law that is justified in its general application." *Maricopa County Medical Society*, *supra*, 457 U.S. at 351. The Court explained:

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the

> ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.

NCAA, *supra*, 468 U.S. at 103-104.

The court has acknowledged that, as "generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable," *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 9 (1979), but that literal application of the *per se* rule can be "overly simplistic and often overbroad." *Id.* Therefore, in order to determine whether challenged conduct is a *per se* violation of the Sherman Act, a court must determine whether the challenged conduct falls "within or without that category of behavior to which [the Supreme Court] applies the label '*per se* price fixing.'" *Id.* On its face, the salary restraint in Resolution G-2 fixes a uniform wage to be paid all Developmental Squad players, and so appears to be a *per se* price-fixing restraint.

Because price-fixing agreements are sometimes lawful when promulgated by parties to a joint venture, analysis of Resolution G-2 under the *per se* rule becomes problematic. The Supreme Court has stated that "[j]oint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 23. The Supreme Court, however, cautioned: "joint ventures have no immunity from the antitrust laws . . . ." *NCAA*, *supra*, 468 U.S. at 113 (internal punctuation marks and citation omitted).[11]

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[11] The *NCAA* case bears factual and legal parallels to the present case. In *NCAA*, two universities sued the NCAA for adopting a plan which limited the amount of televised intercollegiate football games and the number of games which any member college could televise. No NCAA member could sell the rights to televise

Defendants' assertion that the NFL is a joint venture is not disputed. This Circuit has noted that the NFL is a joint venture in which the individual clubs are not competitors in an economic sense:

> The clubs operate basically as a joint venture in producing an entertainment product—football games and telecasts. No NFL club can produce that product without agreements and joint actions with every other team. . . . These economic joint venturers "compete" on the playing field, to be sure, but here as well, cooperation is essential if the entertainment product is to achieve a high quality: only if the teams are "competitively balanced" will spectator interest be maintained at a high pitch.

Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978); *see NCAA*, *supra*, 468 U.S. at 102 (applying joint venture analysis). After so describing the NFL as a joint venture, the D.C. Circuit found that the alleged group boycott restraint—the NFL's college draft system—was "designed not to insulate the NFL from

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live coverage of its football games except according to the provisions of the plan. The NCAA had separate agreements with two television networks: CBS and ABC. The two universities were members of the NCAA and of the College Football Association ("CFA"), which had been formed to promote the interests of major football colleges within the NCAA. CFA negotiated a contract with NBC which would have allowed more televised games for each college, and would have increased the revenues of CFA members. In response, the NCAA threatened to take disciplinary action against any CFA member which failed to comply with the NCAA plan. The Supreme Court, while acknowledging that the NCAA plan was a horizontal restraint which would normally be presumed unreasonable, decided that it "would be inappropriate to apply the *per se* rule . . . ." *Id.* at 100. Critical to the Court's decision was the fact that the NCAA case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101. After applying the rule of reason analysis, the Supreme Court held that the NCAA plan was an unlawful antitrust restraint. *Id.* at 119-20.

competition, but to improve the entertainment product by enhancing the teams' competitive equality." *Smith*, 593 F.2d at 1179. The court concluded that the *per se* rule should not be applied because the draft restraints were "not designed to drive out competitors but to achieve some other goal." *Id.* at 1180.[12] The court continued: "[i]nvocation of a *per se* rule always risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a naked restraint of trade with no purpose except stifling competition." *Id.* at 1181 (footnotes and quotation marks omitted). The court also noted the demanding standard for finding *per se* illegality: "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is *manifestly anticompetitive*." *Id.* at 1181 (emphasis added by D.C. Circuit in *Smith*) (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1972)).

This court cannot find, based on the record before it, that the salary restraint in Resolution G-2 is manifestly anticompetitive or that it has *no* purpose except to stifle competition. The restraint's effect was limited to a small percentage of prospective NFL players and the court can not "describe its impact on the market for players' services as 'pernicious.'" *Smith*, 593 F.2d at 1181. Moreover,

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[12] The court noted that:

> courts have consistently refused to invoke the boycott *per se* rule where, given the peculiar characteristics of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal, or where the concerted activity manifested no purpose to exclude and in fact worked no exclusion of competitors. In view of the joint-venture characteristics of the professional football industry and the purpose of the concerted activity here, these decisions support our conclusion that the NFL player draft is not a group boycott which is illegal *per se*.

Id. at 1180-81 (footnotes omitted).

defendants have alleged that Resolution G-2, including the salary restraint, serves several procompetitive purposes, including enhancing competition in the labor market and thereby enhancing the quality of the NFL's entertainment product. Defendants have supported their procompetitive allegations in the exhibits submitted with their opposition. *E.g.* NFL's Opposition at Exhibits A & C. While defendants claim procompetitive purposes, plaintiffs deny such purposes. Both sides have submitted evidentiary support for their respective positions. Because defendants are part of a joint venture and have offered procompetitive purposes for the salary restraint, the court will analyze the restraint under the rule of reason.

2. Rule Of Reason

Under the rule of reason, the court must determine whether a restraint is "significantly anticompetitive in purpose or effect." *Smith,* 593 F.2d at 1183. This determination requires the court to analyze the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. *Id.* (citing *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692 (1978)). If the analysis reveals that the restraint has legitimate business purposes which would promote competition, the court must then balance the "anticompetitive evils" of the challenged restraint against its "procompetitive virtues." *Id.* (citations omitted). If the anticompetitive evils outweigh the procompetitive virtues, the restraint substantially impedes competition and is therefore unreasonable. *Id.*[13]

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[13] The Supreme Court has noted that it is not necessary to establish a party's monopoly power or market power in order to establish the unreasonableness of a given restraint:

> While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed,

Defendants cannot claim that the uniform salary provision was not significantly anticompetitive in its effect. The uniform salary provision prohibited clubs from paying Developmental Squad players anything but $1,000 per week. This prohibition necessarily eliminated all competition and prevented prospective Developmental Squad players from negotiating salary terms among interested NFL clubs. The salary restraint robbed each seller of football services of any bargaining power, left no room "for competition among the teams for the services of [rookie and first year] players, and utterly strip[ped] them of any measure of control over the marketing of their talents." *Id.* at 1185. While the impact of the restraint on any given plaintiff, whether positive or negative, is not presently before the court, the effect of the uniform salary provision was to "suppress or even destroy competition." *Id.* at 1186 (quotation marks and citation omitted).

Defendants have offered several allegedly procompetitive justifications for the salary restraint. Under precedent in this Circuit, however, and as will be discussed more fully below, the alleged procompetitive purposes are not relevant to the rule of reason analysis. In fact, the procompetitive purposes defendants claim in this case are similar to the ones which the D.C. Circuit rejected in *Smith* after performing the rule of reason analysis under analogous facts.

Several of defendants' procompetitive claims are plainly irrelevant insofar as they lack any correlation between the salary restraint itself and the asserted procompetitive purpose. For example, defendants claim that the additional

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> market power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.

NCAA, 468 U.S. at 110-111 n.42 (quoting Brief for United States as *Amicus Curiae* 19-20).

"development and training opportunities" provided by the Developmental Squads "enhances competition in the labor market for professional football players." *Id.* While implementation of the Developmental Squad concept may further this goal, defendants fail to show how Resolution G-2's uniform salary provision is necessary or even relates to this alleged procompetitive justification. Similarly, defendants' claim that Resolution G-2 creates otherwise unavailable football employment opportunities, even if true, does not provide any procompetitive justification for the salary restraint. The same opportunities would be available if Resolution G-2 did not have a salary restraint. The fact that an employer creates jobs does not allow that employer to violate the Sherman Act by fixing salaries.

Defendants' primary procompetitive claim is that Resolution G-2 "promotes competitive balance in the league by eliminating (1) 'stashing' of quality players and (2) consequent disparities in the number of players available for practice purposes." *Id.* This procompetitive purpose allegedly "enhances the quality of the [NFL's] entertainment product and benefits 'consumers' of NFL football." *id.*[14] Defendants claim that "[b]y stashing quality players and consequently accumulating extra players for practice purposes, [some] teams secured an 'unfair' advantage that threatened to undermine the competitive balance crucial

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[14] While the court acknowledges some correlation between the "stashing" point and the salary restraint, the court does not see the correlation of the number of practice players each team has to the salary restraint itself. Because the basis for both the stashing and equalization objectives (promoting competitive balance among the NFL clubs), is irrelevant to the rule of reason inquiry, however, the court need not address the correlation or lack thereof. The court also notes that the rule of reason analysis "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. . . . [T]he inquiry instead must be confined to a consideration of the restraint's impact on competitive conditions." *Smith*, 593 F.2d at 1186 (quotation marks, brackets, and footnote citations omitted).

to producing the NFL's popular entertainment product." NFL's Opposition at 43-44. This Circuit has expressly found defendants' proffered "competitive balance" and "better product" purposes to be irrelevant to the rule of reason analysis. *Smith,* 593 F.2d at 1186.

Because the discussion in *Smith* directly addresses and disposes of the issues presently before this court, the discussion will be reproduced in its entirety below, replacing the draft restraint in *Smith* with the fixed salary restraint involved in the present case:

> The NFL has endeavored to summarize this justification by saying that the [fixed salary] ultimately has a "procompetitive" effect, yet this shorthand entails no small risk of confusion. The [fixed salary] is "procompetitive," if at all, in a very different sense from that in which it is anticompetitive. The [fixed salary] is anticompetitive in its effect on the market for players' services because it virtually eliminates economic competition among buyers for the services of sellers. The [fixed salary] is allegedly "procompetitive" in its effect on the playing field; but the NFL teams are not economic competitors on the playing field . . . . Because the [fixed salary's] "anticompetitive" and "procompetitive" effects are not comparable, it is impossible to "net them out" in the usual rule-of-reason balancing. The [fixed salary's] "anticompetitive evils," in other words, cannot be balanced against its "procompetitive virtues," and the [fixed salary restraint can] be upheld [only] if the latter outweigh the former. In strict economic terms, the [fixed salary's] demonstrated procompetitive effects are nil.

Smith, 593 F.2d at 1186 (citing *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978)).[15] The court finds that the NFL's alleged pro-

[15] Any claim that the fixed salary provision made the developmental squads themselves more competitive or comparable with

competitive purposes are either insufficient as a matter of law because they fail to justify the necessity of the salary restraint or they are not relevant to the rule of reason analysis.

Even after viewing all inferences in the light most favorable to the NFL, and basing this ruling only on undisputed material facts, the court finds that defendants have failed to establish any legitimate business purpose which would promote competition and thereby make the challenged salary restraint lawful under the rule of reason analysis. Accordingly, pursuant to a separate order issued this date, the court will grant plaintiffs' motion for summary judgment on liability.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: Mar. 10, 1992

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each other is likewise rejected. Because the developmental squads did not compete with each other directly, it is obvious that the purpose of any claimed competitive balance among the developmental squads was to promote greater competitive equality among the parent NFL clubs. Such a competitive equality argument, as discussed above, is irrelevant to the antitrust balancing analysis presently before the court.

[Filed Mar. 10, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1071
(RCL)

ANTONY BROWN, *et al.*,
Plaintiffs,
v.

PRO FOOTBALL, INC., d/b/a WASHINGTON REDSKINS, *et al.*,
Defendants.

ORDER

This case comes before the court on Plaintiffs' Motion For Summary Judgment On Liability, the NFL Defendants' Brief In Opposition To Plaintiffs' Motion For Summary Judgment On Liability ("NFL's Opposition"), and plaintiffs' Reply Memorandum In Support Of Plaintiffs' Motion For Summary Judgment On Liability ("Plaintiffs' Reply"). Upon consideration of the oral arguments of counsel and the record herein, and pursuant to the reasoning set forth in the separate Memorandum Opinion issued this date, it is hereby

ORDERED that Plaintiffs' Motion For Summary Judgment On Liability is GRANTED. Summary judgment is hereby entered on behalf of the plaintiff class against the NFL and the 28 NFL club defendants. Defendants are liable to plaintiffs under the antitrust laws for fixing the salaries of Developmental Squad players in 1989.

Damages shall be determined in a trial to be scheduled.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: Mar. 10, 1992

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-7165 et al.

ANTONY BROWN, *et al.*,
Appellees-Petitioners,

v.

PRO FOOTBALL, INC., *et al.*,
Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE UNITED STATES AS AMICUS CURAE IN SUPPORT OF PETITION FOR REHEARING [1]

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the antitrust laws. The extent to which those laws are held inapplicable because of federal labor law is an issue

[1] Simultaneously with this Brief, the United States is filing a motion for leave to file it in support of appellants' suggestion for rehearing in banc.

in whose resolution the United States has an important interest. We file this brief because of our belief that the Court's decision resolves the issue in a manner that disserves both antitrust and labor policies, and that is likely to have significantly adverse effects that reach well beyond professional sports.

ISSUE PRESENTED

Whether the National Labor Relations Act requires employees to forego unionization in order to bring an antitrust suit against employers who, by agreement among themselves, fix the wages of the employees.

STATEMENT

1. *Background.*

This is an antitrust suit by professional football players who were placed on "developmental squads" of National Football League teams, and paid salaries agreed upon among the team owners. A collective bargaining agreement, which had no provision for developmental squads, expired in 1987. The teams subsequently created these squads, after union-management negotiations about compensation for squad members reached an impasse, the teams agreed among themselves to impose the salaries unilaterally. The players who were paid these salaries sued under the antitrust laws for treble damages and an injunction.

The defendants claimed that their agreement to impose uniform salaries was protected by the nonstatutory labor exemption from the antitrust laws. The district court (Lamberth, J.) struck that defense, ruling that their immunity under this exemption expired when the prior collective bargaining agreement expired, or when the parties reached impasse in their negotiations. *Brown* v. *Pro Football, Inc.*, 782 F. Supp. 125, 130-37 (D.D.C. 1991). Alternatively, it found no immunity because the provision

had never been included in a contract. *Id.* at 137-39. Ultimately, after a jury trial, the district court awarded damages which, when trebled, totalled over $30 million and also permanently enjoined the defendants from setting regular season salaries for any category of players. *Brown* v. *Pro Football, Inc.*, 1993 Trade Case (CCH) ¶ 70,260 (D.D.C.).

2. *The Panel Decision*

The panel in a split decision by Chief Judge Edwards reversed on the ground that the nonstatutory labor exemption from the antitrust laws immunized the defendants' conduct. The panel did not consider it dispositive that every case in which the Supreme Court has found this exemption applicable dealt with a collective bargaining agreement, because "the juxtaposition of policies giving rise to the exemption focuses on collective bargaining as a *process*, not merely on the *product* of that process" (slip op. 14). It noted that the National Labor Relations Act ("NLRA") similarly "focuses on collective bargaining as a process, rather than collective bargaining agreements alone" and established "a carefully defined bilateral process" protecting unions and employers alike (slip op. 16). Thus, the labor laws presume "a delicate balance of countervailing power" and "[i]njecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the federal labor laws" (slip op. 18).

The panel was also impressed by the decisions of the Eighth and Second Circuits to adopt a broad nonstatutory labor exemption in, respectively, *Powell* v. *NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and *National Basketball Association* v. *Williams*, 45 F.3d 684 (2d Cir. 1995). Moreover, it was unable to find a logical endpoint for an exemption that was tied to a collective bargaining agreement (slip op. 19, 21). It assumed there was little impact on antitrust policy, since

the restrant primarily affected the labor market in the context of multi-employer bargaining (slip op. 22-26, quoting at length from *Williams, supra*). It concluded that the nonstatutory labor exemption "requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act" (slip op. 28).

Judge Wald dissented. In her view the majority's approach does not establish a "level playing field" but instead "sharply tilt[ed]" in favor of the owners (Dissent 1). She noted that the exemption endorsed by the majority went beyond any statutory or nonstatutory labor exemption recognized by the Supreme Court or, until recently, by the courts of appeals (Dissent 8-11). The result, she said, is to strengthen the employers' position, reduce their incentive to bargain, and allow them to impose terms not just as a bargaining tactic but as a substitute for a labor contract (Dissent, 12-16, 16-23). She concluded that "terms of employment unilaterally imposed by employers after impasse are *not* exempt from antitrust scrutiny under the nonstatutory labor exemption" (Dissent 24) (emphasis in original).

ARGUMENT

THE CONCERTED IMPOSITION OF TERMS BY EMPLOYERS ON EMPLOYEES IS NOT EXEMPT FROM THE ANTITRUST LAWS

The sweeping antitrust immunity adopted by the majority has no support in Supreme Court precedent. Its requirement that employees choose between the Sherman Act and the NLRA—between antitrust relief for wage fixing by an employer cartel and membership in a union—forces an unnecessary and inappropriate choice, and weakens both antitrust and labor policy. We also agree with Judges Wald and Lamberth that the implementation of multiemployer agreements on terms of employment derives nonstatutory antitrust immunity from

embodiment in a collective bargaining agreement. Since these employers imposed the disputed terms of employment on their employees without such an agreement, their action was not immune from scrutiny under the antitrust laws.

1. The immunity for unilateral employer group action adopted by the majority in this case is a new construct. Contrary to the majority's view, it is not a development of the nonstatutory labor exemption recognized by the Supreme Court. As that Court carefully summarized the law in *Connell Constr. Co.* v. *Plumbers Local 100,* 421 U.S. 616, 622 (1975), "a proper accommodation between congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions."

The Supreme Court's limitation to "union-employer agreements" was not inadvertent. Well before enactment of the NLRA, concerted action by a group of employers to control the labor market was recognized as unlawful under the antitrust laws. *E.g., Anderson* v. *Shipowners Ass'n,* 272 U.S. 359 (1926). The roots of the nonstatutory exemption, on the other hand, are firmly grounded in the statutory exemption for employees, which applies only "[s]o long as a union acts in its self-interest and does not combine with non-labor groups." *United States* v. *Hutcheson,* 312 U.S. 219, 232 (1941). Not surprisingly, therefore, the nonstatutory exemption likewise protects only "the unions' successful attempt to obtain [a] provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups." *Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 689-90 (1965). *Accord, United Mine Workers* v. *Pennington,* 381 U.S. 657, 661-64 (1965) ("a union may conclude a wage agreement with the multi-employer bargaining

unit without violating the antitrust laws"). The results of the various cases addressed by the Supreme Court have been equally unequivocal: collective bargaining agreements immediately promoting the unions' interests in eliminating competition based on wages and working conditions have been uniformly upheld, while those based on employer interests (including interests in their competitors' employment standards) have been rejected. *Compare American Federation of Musicians* v. *Carroll*, 391 U.S. 99, 107-12 (1968); *Jewel Tea, supra*, at 691-97; *Teamsters Union* v. *Oliver*, 358 U.S. 283, 293-94 (1959), with *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40, 61-62 & n.20 (1978); *United Mine Workers* v. *Pennington, supra* 666-67; *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797, 809-11 (1945).[2]

Thus the Eighth Circuit was merely stating established law when it held that the nonstatutory exemption applies only to agreements that are "the product of bona fide arm's length bargaining" with the unions. *Mackey* v. *National Football League*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).[3] *Accord, In re Detroit Auto Dealers Ass'n*, 955 F. 2d 457, 463 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992).

2. The majority's decision, unlike the established body of law, does not base the nonstatutory labor exemption on workers' collective bargaining agreements. Instead, it creates a new, far broader implied antitrust immunity for employers based on the "process" of collective bargaining contemplated by the National Labor Relations Act, and in doing so strays far from the statutory grounding of the exemption.

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[2] In *Connell*, even an agreement with a union was held non-exempt in part because the union did not represent the signatory firm's employees. 421 U.S. at 625-26.

[3] Even the Eighth Circuit's more recent decision in *Powell* v. *National Football League, supra*, places its roots in this well-estabilshed body of precedent.

While the antitrust laws and the labor laws are both expressions of fundamental national policy, courts have no roving mandate to favor one over the other. Ordinarily, of course, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden*, 308 U.S. 188, 198 (1939). Creation of a new implied antitrust immunity under the NLRA is a form of implied repeal. It is "well-established" that such repeal "is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. . . . Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary." *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388-89 (1981) (internal citations omitted). The "accommodation" of labor and antitrust policies underlying the established exemption for union-employer agreements, *Connell*, *supra* at 622, does not imply a less stringent test, for it is firmly grounded in what "labor policy requires," *ibid.*, and overrides the antitrust laws only to the extent there is a "conflict" with such a requirement. *See Pennington*, *supra* at 666. But in this case, there is no conflict requiring a new exemption. Rather, the employers are seeking to establish, from a statute meant to enhance workers' rights to unionize, an implied Congressional intent to create a sweeping pro-management antitrust exemption which workers can avoid only by avoiding unions. See *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 316 (1965).[4] In that context, they have not come close to making the showing necessary for an immunity based on the process of bargaining.

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[4] Since these workers have chosen a union and would be deprived of that choice as the price of bringing an antitrust suit, the proposed new exemption stands on its head the concept of "voluntary unionism" embodied in the labor laws. Compare *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 105 (1985) (cited at slip op. 18).

The NLRA does primarily regulate the process of collective bargaining (slip op. 16). Under the labor laws, however, that process is not an end in itself, but a means to an end. It is a "process that look[s] to the ordering of the parties' industrial relationship through the formation of a contract." *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960). The existing nonstatutory labor exemption, therefore, is simply a common sense recognition of the fact that the ultimate purpose of the labor laws and of the statutory labor exemption would be frustrated if such labor contracts, once reached, were declared invalid under the antitrust laws. *See Meat Cutters* v. *Jewel Tea Co., supra*, 381 U.S. 711-12 (opinion of Goldberg, J.). The only question in such cases is how far into the product market the negotiated restraints may extend.[5] Unilateral action by a group of employers to impose the terms that they should be negotiating with their employees' representatives plainly does not occupy the privileged position of being the desired end product of the bargaining process.

The majority nonetheless thought that unilateral employer agreements during the bargaining process should be totally immunized, because applying the antitrust laws

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[5] Three sets of opinions in the *Pennington* and *Jewel Tea* cases illustrate the dispute. Justice Goldberg would have held the agreements in both cases exempt from the antitrust laws as union contracts involving mandatory subjects of collective bargaining. 381 U.S. at 735. Justice Douglas would have held both agreements fully subject to the antitrust laws because they restrained the product markets. *Id.* at 672, 735. Justice White writing for the Court in *Pennington* found that wage agreement not exempt because it imposed terms outside the bargaining unit, *id.* at 665-66, and in *Jewel Tea* he thought the agreement exempt because the restraint on marketing hours had an "immediate and direct" effect on the working hours of the covered employees. *Id.* at 691.

A restraint on marketing hours similar to that in *Jewel Tea*, but adopted unilaterally by a group of employers to placate their salesmen and fend off unionization, was found not exempt in *In re Detroit Auto Dealers Ass'n, supra*, 955 F.2d at 461-67.

would disrupt "the delicate balance of countervailing power" "by giving unions a powerful new weapon, one not contemplated by the federal labor laws" (slip op. 18). That reason is seriously mistaken, however. There are numerous federal statutes, such as the Fair Labor Standards Act and the Occupational Health and Safety Act, which favor unions by raising the baseline from which negotiations start. The antitrust laws, we submit, are no different; their application simply means that negotiations should ordinarily start from a competitive wage level rather than a level set by an employer cartel.[6]

More importantly, the labor laws themselves are not concerned with any particular balance of power between unions and employers and are not intended to equalize the parties' bargaining power. *NLRB* v. *Insurance Agents' Int'l Union, supra,* 361 U.S. at 490. Indeed, the Supreme Court specifically held in that case that the Board may not attempt to "regulate the choice of economic weapons that may be used as part of collective bargaining." *Id.* at 490-98. But that is precisely what the majority has done here. It strips organized employees of an antitrust cause of action because it considers such a suit too powerful an economic weapon, and conversely allows those same employees to bring an antitrust action only if they surrender their right to unionize. There is simply no warrant in the labor laws for that holding and for the wholesale displacement of the antitrust laws it entails.

3. The panel's majority creation of a new and unsound antitrust exemption for management is sufficient reason for the Court to grant rehearing. But since at least one factor in the majority's thinking was its dissatis-

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[6] In the case of sports leagues, their joint venture characteristics might sometimes justify rule of reason treatment of unilateral league restraints on wage competition that would be considered per se illegal in different industries. *See McNeil* v. *NFL*, 790 F. Supp. 871, 896-97 (D.Minn. 1992). That is a matter separate from any labor exemption, however, and is not before the Court.

facton with various tests for determining when the management's nonstatutory exemption ends (slip op. 19-21 & n. 6), we wish briefly to address this point.

There is a strong argument that the recognized nonstatutory labor exemption should end when the contract containing the collective bargaining agreement has expired and the parties in post-expiration negotiations for a new contract have reached impasse. Up to that point the labor laws generally require employers to maintain the wages and working conditions set in the expired collective bargaining agreement. *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). If the antitrust exemption were withdrawn before impasse, employers would risk treble damage liability under the antitrust laws by complying with the labor laws' mandate to maintain the prior collectively set terms. But once impasse occurs, employers are free under the labor laws to alter the status quo and impose new terms of employment without regard to the union's consent, so long as they are within the scope of good faith proposals previously made to the union.

In practical world of labor-management relations, however, the precise point of impasse often is not easily identified and requires a complex factual determination. Moreover, the labor laws counsel caution in declaring an impasse in bargaining. Thus, there is a justification in labor policy for the implied immunity to endure for a reasonable time after impasse—for example, for such time as would be reasonable in the circumstances for the employers to take steps to ascertain, upon advice of counsel, whether impasse has in fact occurred, whether the restraint in question would be likely to violate the antitrust laws, and, if so, to adjust their business operations so as to eliminate the proposed restraint. There is also justification in labor policy for concluding that, in no event, should antitrust immunity continue once the employers, after impasse,

have jointly elected unilaterally to impose their proposed terms. For such unilateral action (which would constitute an unfair labor practice if made prior to impasse) would clearly indicate the employers' assumption that impasse has occurred and their intention to impose their terms even without the union's agreement.[7]

CONCLUSION

For the reasons stated, the Court should grant rehearing or alternatively rehearing in banc.

Respectfully submitted.

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[7] When the members of a multi-employer group do impose terms, they may avoid antitrust liability by not acting in concert with each other—a result fully consonant with the labor laws, which leave individual employers at this point free to make temporary individual deals with the union pending adoption of a unit-wide agreement. *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 414-15 (1982).